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Brief of Richardson for Respon

No. 475

Filed Oct. 11, 1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GUNNISON,
Petitioner,
vs.
E. H. ROLLINS & SONS, (a Corporation),
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR THE WRIT OF CERTIORARI.

H. B. JOHNSON,
EDMUND T. RICHARDSON,
Attorneys for Respondent.

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As we are advised by the petition for the writ of *certiorari* in this cause, the application is founded upon the terms and provisions of section 6 of the Act of Congress of March 3, A. D. 1891, in relation to the establishment of a Circuit Court of Appeals, etc. Were it not for the exceptions found in that section, this action is one

which would be absolutely final in the jurisdiction of the United States Circuit Court of Appeals for the Eighth Circuit. It is not pretended that the application is made for any other reason than that the Supreme Court, in the exercise of the discretion confided to it by the fifth paragraph of the section, has a right to review the decision of the Circuit Court of Appeals if it shall elect so to do. The decision complained of, which the petition seeks to reverse, is found in 80 Fed. at page 692, and closes in this language; "The judgment of the Circuit Court must be reversed and the cause remanded for a new trial." It will be seen from this language that, while it is admitted that were it not for the excepting clause, the jurisdiction of the Court of Appeals would be final, yet nevertheless the decision which was rendered does not constitute a final determination of the cause. If then this court should take jurisdiction under its supervisory power by the writ of *certiorari* it is plain to be seen that should the court concur in the conclusions, or any of them, arrived at by the Court of Appeals, the cause will nevertheless have to be returned to the Circuit Court for a new trial. In that aspect of the case, we are constrained to suggest to this court that it decline to take jurisdiction at present, in any event until the Circuit Court and the Circuit Court of Appeals have agreed upon a decision therein. It will be time enough for this court to exercise the supervisory power confided to it at a time and upon an occasion when it is impossible for a losing party to go further in the cause. When such a time arrives it will be sufficiently soon, in our opinion, under the adjudications which have been made upon applications of a similar character, for this court to look into the merits of the cause. This case does

not fall within any of the cases, so far as we are able to ascertain, where the writ has been granted by this court. The interest to be subserved here affects only the inhabitants of a county and the property owners therein, on the one hand, and the owners of the bonds and coupons of the county, on the other hand. There is here no international principle of law in question, and no great harm immediately impending against anybody by virtue of the decision which has been rendered. We therefore confidently expect that the court will decline to exercise its supervisory jurisdiction, at least until one of the parties can come to this court and say, we can go no further unless this court will take jurisdiction; we have suffered and are without remedy elsewhere. Such investigation as we have been able to make would indicate that such will be the action of this court in the premises.

Rice vs. Sanger, 144 U. S. 197.

Chicago, etc. R. R. Co. vs. Osborn, 146 U. S. 354.

American Construction Co. vs. Jacksonville T. K. & W. R. Co. 148 U. S. 372.

Forsyth vs. Hammond, 166 U. S. 506.

Not knowing, however, under the rules so far laid down by the Supreme Court, exactly when the court will and will not take jurisdiction of a cause by granting the writ, we are not justified in resting at this point. We will, therefore, take up and consider with what degree of hasty preparation the time has enabled us to make since the service of the notice, the petition and brief of the other side.

Fifteen distinct assignments of error, touching the

decision of the Court of Appeals, have been made. These assignments, however, are discussed under two propositions in the brief, which may be distinctly stated as follows:

First: It is claimed that the Court of Appeals was without authority to consider the question of the *bona fides* of the plaintiff, because the bill of exceptions did not purport to contain all of the evidence.

Second: It is claimed that the semi-annual statements and the record of proceedings of tho Board of County Commissioners, which were sought to be introduced in evidence, were properly receivable for the purpose of constructive notice.

We will discuss these two propositions in the order suggested.

I.

It is claimed that the Court of Appeals was without authority to consider the question of the bona fides of the plaintiff, because the Bill of Exceptions did not purport to contain all of the evidence.

The opinion itself is the best answer to the contention of counsel upon this point. The basis upon which the opinion was rendered was that the semi-annual statements were insufficient to charge anyone with constructive notice and the court below having held that they were admissible for that purpose, and having instructed the jury to return a verdict for defendant upon that theory, it became imma-

terial whether or not the plaintiff was a *bona fide* holder of the bonds in suit. Inasmuch as the court was constrained to hold that such a ruling was erroneous, the question of whether or not the plaintiff was a *bona fide* holder should have been submitted to the jury. It is true that the court remarked that as to five of the bonds it was clear, under the record which the court had before it, that the plaintiff was a *bona fide* holder within the meaning and intent of the law upon that subject. But the point upon which the case was decided simply caused the Court of Appeals to observe, that entertaining the view it did of the so-called semi-annual statements, and it appearing from the record which it had before it that the plaintiff was a *bona fide* holder of five of the bonds, and might or might not be the *bona fide* holder of the other five bonds, that in any event the question of *bona fides* was a question for the jury, which would have to be disposed of in a new trial. Nor will the ingenious reasoning of astute counsel be able to convince this court otherwise after a mere glance at the opinion filed. The court say: (80 Fed. p. 700): "The testimony contained *in the present record* shows, we think, without contradiction, that the plaintiff was a *bona fide* holder, when the suit was brought, of at least five of the bonds which are involved in the present controversy, because it holds the title of Joseph Standley, who was himself an innocent purchaser of said bonds, before maturity, for the price of 98 cents on the dollar. * * * Whether the plaintiff acquired the last mentioned bonds under circumstances which constitute a *bona fide* holder is a question which may require the consideration of a jury, and we shall not undertake to decide it *on the facts preserved in the present record.* The testimony above con-

sidered appears to have been admitted by the trial court on the assumption that it was competent, even as against a *bona fide* purchaser of funding bonds, for the purpose of impeaching the bonds; and as *we cannot concur in that view*, the judgment of the Circuit Court must be reversed, and the cause remanded for a new trial."

If the foregoing language means anything, it means exactly what it says, to-wit: That because of the reversal of this cause for another reason, in the light of that reason it may become necessary to take the opinion of the jury upon the subsidiary point. It is not true that the court, after refusing to review or consider the weight of the testimony so as to determine whether the peremptory instruction of the court was right or wrong, then proceeded to take up and discuss and decide that the instruction was wrong on the evidence which was offered, and we are surprised that counsel should contend for such a proposition before a court of this character.

There is, therefore, but one question which merits any consideration whatever at the hands of this or any other tribunal, as affecting the correctness of the conclusion arrived at by the Court of Appeals, viz. the second proposition, which we will now proceed to discuss.

II.

It is claimed that the semi-annual statements and the record of proceedings of the Board of County Commissioners, which were sought to be introduced in evidence, were properly receivable for the purpose of constructive notice.

For lucidity of statement and accurate definition of the position taken, it would be difficult for anyone, and entirely impossble for the writer, to add anything to or improve upon the language of the decision as promulgated by Judge Thayer, and concurred in by Judges Sanborn and Lochren. But we will attempt to analyze the position taken by counsel for petitioner, and we would like to have our remarks considered in connection with the decision.

It is claimed that semi-annual statements of Gunnison county made for the periods ending respectively December 31, 1881, June 30, 1882, and December 30, 1882, showed respectively the total indebtedness of the county, including bonds and warrants outstanding, to have been $77,559.01 for the first period, $118,691.49 for the second period, and $284,763.05 for the third period, and that a certified copy of the officers' proceedings, bearing date shortly prior to the issuance of the bonds, recited that the floating indebtedness of Gunnison county on August 21, 1882, amounted to $174,115.29. The certificates of the assessed valuation were also received in evidence showing that in the year 1880, which would end under a recent decision of our Supreme Court (see Standley vs. Lake County, 49 Pac. 23,) on September 1, 1881, such valuation was below the million-dollar mark. The assessment of 1881, which

would terminate on the 1st of September, 1882, was slightly above the million-dollar mark, and the assessment of 1882, which was the one governing at the time of the issuance of the bonds in question, amounted to the sum of $2,340,955.

Section 1 of the Funding Act of September 21, 1881, prescribes and defines the duty of the Board of County Commissioners in such a case as the one at bar. In the latter part of the section this language appears: "The whole amount of bonds issued under this act shall not exceed the sum of the county indebtedness at the date of the first publication of the aforementioned notice, *and the amount shall be determined by the county commissioners, and a certificate made of the same, and made a part of the record of the county.*" It will be observed, in the first place, that the complaint of counsel, with reference to this matter, is not well taken, because the act is dealing with the floating indebtedness of the county as a basis for the exchange of the evidences of such floating indebtedness for bonds. It then provides that the whole amount of the bonds shall not exceed the sum of the county's indebtedness. We pause here to remark that a county can have no floating indebtedness whatsoever except lawful indebtedness. The section is not dealing with anything except the actual *bona fide* debts of a county; and as the authority must be lodged somewhere to determine what that indebtedness is, in any case where bonds are proposed to be issued, the authority is lodged by this statute in the most natural place in the world, towit, in the Board of County Commissioners of the county, and the language is of such a character that it admits of no doubt that the amount of this indebtedness shall be determined; that is, not only

ascertained, but fixed upon, decided and promulgated by the Board of County Commissioners. In other words, *determined*, and a certificate made of the same. The lawmakers observed that under the constitution it was necessary, as we shall presently see, to ascertain several things in making up this determination. First, what is the assessed valuation of the county? Second, what has been the assessed valuation of the county for the years gone by in which the warrants were issued representing the indebtedness which the county had contracted? Third, what present indebtedness can the county have under the constitutional inhibition? Fourth, what indebtedness did it have prior to the time that it reached the million-dollar valuation? Fifth, what indebtedness, if any, was the county responsible for before the adoption of the constitution in 1876? And when the county board had passed upon these matters, and segregated the warrants in such a manner as to ascertain when the indebtedness was contracted which was represented by the warrants, they were then to determine the gross sum of the valid indebtedness, make a certificate thereof, put it on the records of the county where anybody might see it, and ascertain the character of it. What was the object of this section? It was for the express purpose of advising the proposed bondbuyer of the exact amount of the county's indebtedness, as ascertained and certified to by the authority to which the law confides the making of the certification. Counsel's argument might be well taken provided this county had, after ascertaining that its valid floating indebtedness amounted to $174,000 odd, thereupon issued bonds to the extent of $300,000, or any other sum larger than $174,000, and the act itself recognizes that such a thing was impossi-

ble to be done, for it provides,—and that was the thing which was the warning to the bond-purchaser,—that any bond issued in excess of the sum of the county's indebtedness, so determined by the Board of County Commissioners, should be null and void. As a further check upon the Board of County Commissioners, it was required that each bond should be registered with the auditor of the state as the same was issued.

In view of this analysis, and of the language used by the learned Thayer, it seems to us that this court will not agree with the contention of counsel, that the board was under the mere perfunctory obligation of simply adding up all of the purported items of indebtedness which were out-standing against a county, and thereby became, in the language of the brief filed on the other side, a simple adding machine for the purpose of finding the result in a matter of simple addition. If such be the position intended by the framers of the statute, then the statute were worse than useless, because anybody could have taken these semi-annual statements and made the same addition.

But entirely irrespective of that proposition, there is a second and much better reason for the conclusion at which the Circuit Court of Appeals arrived, even though the statement thus made by the Board of County Commissioners should in all respects conform to a computation made under the various semi-annual statements as contended for by counsel. Counsel treats the issue of a warrant as synonymous with the *creation* of a debt. This view has been expressly repudiated in a number of decisions, notably in the case of Wilder vs. Board of County Commissioners of Rio Grande County, 41 Fed. 512; also in Standley vs. Board of County Commissioners of Lake

County, 49 Pac. 23. A warrant is but the evidence of a debt, even if it arises to that distinction. It is, in strict legal parlance, simply an order by one county officer upon another county officer who has the custody of the county funds. It is a voucher used by the custodian of the funds to account for the disbursement of such funds; and the mere fact, if it be a fact, that it would have been seen by an examination of the semi-annual statements, as contended for by counsel, that large amounts of warrants were being issued between the various semi-annual statements provided for by section 30 of the act of March 24, 1877, is no evidence, not even the slightest, that the indebtedness represented by such warrants was *contracted* at a time when the constitutional inhibition of section 6 of article 11 of the state constitution of Colorado was in force as to this county. In fact the warrant indicates that the indebtedness thereby represented, if represented at all, was an indebtedness which had been contracted before, and the warrant was simply the means by which the funds in the treasurer's hands could be gotten at for the payment of such indebtedness.

We have no fault to find with, and we are equally as swift in eulogizing the conclusions promulgated by Judge Sanborn in the case of the National Life Insurance Co. vs. Board of Education, 62 Fed. Rep. 778, as counsel on the other side. Counsel adroitly quoted one of the conclusions from that case, we desire to be permitted to quote the other.

"Where a municipal body has lawful authority to issue bonds or negotiable securities, dependent only upon the adoption of certain preliminary proceedings, and the adoption of those preliminary proceedings is certified on the

face of the bonds by the body to which the law intrusts the power, and upon which it imposes the duty, to ascertain, determine, and certify this fact before or at the time of the issuing of the bonds, *such a certificate will estop the municipality, as against a bona fide purchaser of the bonds, from proving its falsity in order to defeat them.*"

Citing Chaffee Co. vs. Potter, 142 U. S. 355, and eighteen other decisions promulgated by this Honorable Court.

Our constitution prescribed a limit of indebtedness as based upon the question of an assessment; it then prescribes that certain exceptions over and above the amount therein limited shall be lawful, valid and binding upon the various counties; and in pursuance of that section the law-makers prescribed a way to determine what the real amount was. This board, in this case, did prescribe that amount. They did make the determination of it; they did make the certificate thereof, and they announced to the world that the lawful and correct amount was $174,000 odd. It is therefore clear, First, that there was an authority to issue the bonds; Second, that the preliminary proceedings prescribed by the statute, and of which the bondholders must take notice, were all complied with; and, Third, that the amount of such bonds are not in excess of the preliminary determination so prescribed. Wherein then is the county not estopped from denying and asserting to the contrary? What rule of law, either in Dixon Co. vs. Field, or any similar case, requires this bondholder to go behind that determination and ascertain for himself the facts required to be ascertained and determined by the Board of County Commissioners? If estoppel does not arise in this case, wherein was there any reason for assert-

ing the doctrine of estoppel as announced in the Chaffee Co. case and those similar in character?

The brief which we have under consideration seems to promulgate the idea that if the bondholder, by any hook or crook, could possibly ascertain that the issue of bonds exceeded the constitutional limit, yea, even if such issue did exceed the constitutional limit, even though neither he nor anyone else could by any possibility have ascertained it from the records of the county, yet nevertheless, under the doctrine of Dixon Co. vs. Field, 111 U. S. 83, the bondholder would not be permitted to recover in this action. We do not so read the case of Dixon Co. vs. Field We understand that, notwithstanding the fact that there may be a constitutional limit of indebtedness, and notwithstanding the fact that a county has issued bonds in excess of that limitation, yet in a certain class of cases, to which the case of Chaffee Co. vs. Potter belongs, such bonds may be binding upon the municipality which issued them.

Section 2 of Article 12 of the Nebraska constitution, which was under consideration in the case of Dixon Co. vs. Field, as found at page 87 of 111 U. S., provides that a county in attemping to make donations to a railroad company should not exceed 10 per centum of the assessed valuation of the county. In that case Dixon county was attempting to issue $87,000 worth of bonds, each bond reciting the act under which it was issued, and the total amount. It was held that inasmuch as anybody, with the constitution in one hand, and the bond of the series in the other, could ascertain by glancing at the assessed valuation for the year in which the bonds were issued, that the whole amount of such issue could in no event exceed $58,733 that

such bonds were void, and that no recital in the bond could estop the county from asserting such invalidity, because upon the face of the bonds, and the recitals therein contained, a falsification of the statement would be made to appear. On the other hand, in Chaffee Co. vs. Potter where a bond identical in form with the bond here under consideration was before this court for determination, the court said that no one with one of the bonds in one hand, and the constitution in the other, either with or without a consideration of the assessed valuation of the county, could say whether the total amount of such bonds were valid or invalid, and they therefore held that such bonds were valid.

Counsel are driven to great lengths in their argument to avoid the force and effect of this decision. They claim that the attention of the court was not, in that case, called to the same facts which exist here; that had the attention of the court been called to the fact of these semi-annual statements, the court would have said, in counsel's opinion, that the purchaser of the bonds was as much required to take notice of section 30 of the act of March 24, 1877, as he was required to take notice of section 1 of the funding act of August 21, 1881, under which the bonds were issued. The Court of Appeals do not agree with counsel. Neither do we. But let us admit for a moment, for the purpose of argument, that we do agree with counsel, and that we were required to take notice of the semi-annual statements provided for by section 30 of the act mentioned. Of course, the examination of such statements should take place in the light of the constitutional provisions. Section 6 of article 11 of the constitution provides, that while it is true that counties in which the assessed valuation of taxable

property shall exceed five million of dollars, should never have an indebtedness in excess of $3 on each thousand thereof; and counties in which the valuation shall be less than five million of dollars, should not have an indebtedness in excess of $6 on each thousand thereof, except by a vote of the people; and that such indebtedness as is hereinbefore mentioned should not be created to an amount greater than one-half of the above sum in any one year, the same section also provides that there shall be excluded from the consideration of this amount all debts contracted before the adoption of the constitution, and there should likewise be excluded all debts which had been incurred up to the time that the county reached the valuation of one million dollars in the provision that "this section shall not apply to counties having a valuation of less than one million of dollars." If the section did not apply up to the time the county reached the one million dollar limit, so far as that county or anything which it did was concerned, this section was precisely the same as though it had never been. When, and not until, the county reached the million-dollar valuation the section became applicable to it. We therefore conclude that in determining the amount of county debts, something more than a mere computation was called for by the constitution.

Gunnison County was created by the act of March 9, 1877, found in the General Laws of 1877, at page 213 *et seq.* By section 7 of that act it is provided that "the present indebtedness of the county of Lake shall be apportioned between the counties of Lake and Gunnison in proportion to the taxable property in each as shown by the assessment roll for the year 1876." It will be seen, therefore, that Gunnison County, at the very time of its cre-

ation, started out with an indebtedness belonging theretofore to Lake County. It will be further seen that Lake County was among the original counties created by the first legislature which ever sat in the territory of Colorado. See section 33, page 57, of the Session Laws of 1861, as found in the Revised Statutes of 1868, at page 162. Clearly then Gunnison County had an indebtedness which was contracted before the adoption of the constitution. The constitution was adopted on the first day of August, A. D. 1876, and was ratified by the president of the United States in a proclamation promulgated on the 24th day of that month. This record shows that the county did not reach the million-dollar mark until the first day of September of 1881, and all indebtedness which had accrued prior to that time must, of course, be excluded in the computation which the commissioners were required to make. From the first day of September, 1881, down to the 21st day of August, 1882, the only contention which is presented, either in the record or in the brief of counsel on the other side, is that a large amount of warrants were issued. An examination of Exhibit "H" will fail to show anything inconsistent with the proposition that the total amount of the county's indebtedness might have been entirely compatible with the constitution of the state of Colorado. No man can examine that statement and determine from it when a single cent of the indebtedness purported to be represented by it was contracted. So that if we adopt counsel's contention that we were required to take notice of these statements, as the Court of Appeals did not, we are certainly entitled to stand on the broad language of the Court of Appeals by adding thereto, in brackets, as follows: "It may be conceded, though not decided, that a

purchaser of bonds in question was affected with notice of all the facts disclosed by the record of the proceedings of the board which culminated in the issuance of the bonds [and all of the semi-annual statements introduced in evidence]; but, notwithstanding this concession, we are of opinion that the record made by the Board of County Commissioners [and of the semi-annual statements] disclosed no facts rendering the bonds void in the hands of an innocent purchaser for value." If upon any theory the bonds can be held valid, it is the duty of the court to so hold them. The holder of a negotiable bond does not come into court with every presumption and intendment of law against his bonds; he rather comes there with every presumption and intendment in his favor; and if the county desires to avoid his bonds they must do it by evidence so clear and satisfactory that the court cannot escape the conclusions that the purchaser either knew or in law must have known that the bonds which he purchased were invalid. In the light of this record, showing as it does that these bonds were selling for 98 cents on the dollar, and that too in a country where the customary rate of interest for short time loans at that date ran from 18 to 36 per cent per annum, when we have before us for consideration an 8 per cent bond, the price speaks volumes for the consideration in which the bonds were held before this county attempted to repudiate them. So that there would seem to be no escape from the conclusion at which the Court of Appeals arrived, even though we take into consideration the semi-annual statements which the Court of Appeals refused to do. The reasoning is precisely as good in the one case as in the other, and while, as a matter of law, the decision of the Court of

Appeals was right, it would have made no difference in fact had they placed it upon the other ground of requiring the respondent to take notice of the semi-annual statement instead of the statement provided for by the Funding Act itself. The conclusion would have been the same in either case.

It is difficult to see the force of counsel's remarks as applied to the Sutliff case, found in 147 U. S. This court expressly held in that case "that the case at bar does not fall within Chaffee Co. vs. Potter, and cannot be distinguished in principle from Dixon Co. vs. Field, or from Lake Co. vs. Graham." This case is precisely on all fours with the Chaffee County case. This is the Chaffee County bond *verbatim et literatim*, drawn, as counsel say, by the same cunning hand.

If counsel had fully considered the Sutliff case (although it is immaterial if the last position which we have taken is true that notice of the semi-annual statements would not change the result), counsel would have seen that the court, in rendering the decision, drew the distinction sharply between the Sutliff case and the case of Chaffee Co. vs. Potter, in this language: "That decision (referring to Dixon Co. vs. Field) and the ground upon which it rests were approved and affirmed in Lake Co. vs. Graham, and Chaffee Co. vs. Potter, above cited, each of which arose under the article of the constitution of Colorado now in question, *but under a different statute, which did not require the amount of indebtedness of the county to be stated* on its records." If that language was not authority for the conclusion arrived at by the Court of Appeals in distinguishing the case at bar from the Sutliff

case, then the language used does not convey the meaning which the court intended it to convey.

Our contention is, and ever has been, that one might be charged with all of the knowledge contained in all of the records of Gunnison County which have been introduced, or sought to be introduced in evidence, and with one of these bonds in his hand or all of them for that matter, he would be unable to say, as a matter of fact, that the constitutional limitation had been exceeded. If the amount represented by the bonds had been invalid, and under the decision of Chaffee Co. vs. Potter it is immaterial whether such indebtedness is valid or invalid, the county is estopped from asserting the contrary. It is only by inferring something, viz. that the *issuance* of a warrant *creates* a debt and by ignoring the constitutional exceptions that you can arrive at the conclusion that Gunnison county had an excess debt funded in in these bonds.

How counsel is able to conclude that there is no discrepancy between the certification made by the Board of County Commissioners under section 1 of the act under which the bonds were issued and the semi-annual statements provided for by section 30 of the act of 1877, passes comprehension. These statements do not purport to be made as of the same time as the statement required by the funding act. And after asserting and repeating that no discrepancy exists between the two, counsel say after a comparison of them that "it will be found that the amount must have been just about the sum certified by the commissioners." If it were pertinent to this matter, it would not take very long to determine, as a mathematical proposition, that a discrepancy does exist between two things

which are being compared, when, as a matter of fact, one is just about the same as the other. Counsel's conclusion is neither good logic nor good mathematics. But however that may be, we have already shown that whether there be such a discrepancy or not is wholly immaterial. It may be remarked however in passing that the Court of Appeals did not assert that there was any discrepancy. They simply say that if a discrepancy did exist, then the statement called for by the act itself would be controlling.

There remains but one additional matter for our consideration before closing this brief, and that is as to the ruling of the court upon the question of the admission of the three lists of county warrants which were surrendered to the county by the owners in exchange for some of the funding bonds in the suit. It is explained by counsel that the "purpose of the offer was to show an indiscriminate exchange of valid and invalid warrants for funding bonds." This is a begging of the entire question. What warrant in that list, which was successfully introduced against an objection, shows that it was for an invalid purpose? Counsel seem to assume in this particular that if they could only introduce warrants for a gross sum sufficiently large to be in excess of the percentage of the indebtedness allowed by the percentage clause of the constitution, then the county had done all that was required of it. No examination of a county warrant can determine whether or not that warrant is valid or invalid. It is only by tracing the county warrants back to the contraction of the indebtedness represented thereby that such a determination can be made, and the burden was upon the county to do that if they desired to escape the payment of the bonds for which these warrants were exchanged. In not a single in-

stance nor as to a single warrant was such an offer made. The warrants were, therefore, clearly immaterial for any purpose, and should have been excluded.

We do not assume, in these proceedings, invalidity. The presumption obtains that the indebtedness is valid until the contrary be made to clearly appear. The Court of Appeals was therefore right in holding that these lists were inadmissible in contradiction of or to overcome the recitals which the bonds in controversy contained; and even if they had been properly introduced, there could have been no assumption of invalidity therefrom except by inference. This contention is about on a par with the statement of counsel that "Rollins undoubtedly guaranteed the validity of the bonds to him (Standley) or he would not have repurchased them upon the threshhold of the suit," a matter which nowhere appears in evidence.

The complaint that the Court of Appeals overlooked the fact that these coupons were sued upon, first in the name of Potter and afterwards in the name of Sanders and Proby seems to be a cause of great grievance to counsel; but we are unable to see from his complaint what he predicates upon the failure of the court to so overlook this fact. If the bonds were Standley's, the fact that somebody else attempted to sue upon them could in no manner prejudice Mr. Standley's rights, and as counsel fail to show wherein their grievance lies upon this part of their brief, we shall pay no further attention to it.

There are numerous matters touching the details of this cause which we are unable to go into in this brief for lack of time in which to prepare and present it to this court within the limit of the notice served upon us, but we have treated these matters somewhat extensively in the

briefs which we have caused to be filed in the Court of Appeals; and we ask, in connection herewith, to file a few copies of our brief there used, so that the court may look into it in connection with the questions here under consideration.

The conclusions of the Court of Appeals were unquestionably right. The reasons given for such conclusions were just as unquestionably right. The reasons, whether right or wrong, cannot affect the righteousness of the conclusions. The application for the writ of *certiorari*, therefore, ought to be denied.

Respectfully submitted.

H. B. JOHNSON,

EDMUND F. RICHARDSON,

Attorneys for Respondent.

FILED
DEC 10 1898
JAMES H. McKENNEY,
Clerk.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF ARAPAHOE, STATE OF COLORADO,

Petitioner,

vs.

B. H. ROLLINS & SONS,

Defendant.

On Writ of Certiorari to the Supreme Court of Appeals for the County Circuit.

Brief for B. H. Rollins & Sons.

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(2) It was pleaded and proved that plaintiff was a *bona fide* holder, that is, paid value and had no notice of any alleged illegality 33

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Plaintiff had no notice from bond numbers of any excessive issue of bonds 35

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(2) Because the bonds in the present case, like the bonds in the case of Chaffee County vs. Potter, and unlike the bonds in the case of Sutliff vs. Lake County, contain an express recital "That the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado" 61

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With all due respect to the opinion of this court in the case of Sutliff vs. County of Lake, 147 U. S., 230, we respectfully submit that section 30 of the act of March 24, 1877, which provides that the county officers shall make semi-annual statements, did not expressly or impliedly provide that such semi-annual statements should have any connection, and they do not have any connection whatever with the issuing of any county bonds 78

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(4) These financial statements do not show or pretend to show when the indebtedness was incurred which was represented by the warrants, and which was finally funded into funding bonds. For all that these statements show, such indebtedness may have been incurred prior to the adoption of the constitution, or prior to September 1, 1881, when Gunnison County first attained an assessed valuation of $1,000,000, and up to which time, therefore, the debt-limit clause had no application to that county. The bonds in question in this case recite that they "are issued in exchange at par for valid floating indebtedness of the said county" 88

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Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 178.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GUNNISON, State of Colorado, Petitioner,

AGAINST

E. H. ROLLINS & SONS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR E. H ROLLINS & SONS.

Statement of Case.

This is an action at law begun March 1, 1895, in the Circuit Court of the United States for the District of Colorado, by Messrs. E. H. Rollins & Sons, a corporation organized and existing under the laws of the State of New Hampshire, to recover judgment on coupons attached to certain negotiable funding bonds, dated December 1, 1882, issued by the County of Gunnison, State of Colorado (Complaint, Record, pp. 1–7). A

copy of the said bonds and the coupons thereto attached is set forth at length in the complaint (Record, pp. 2, 3). The said bonds contain the following recital, to wit (Record, p. 2):

"This bond is issued by the Board of County Commissioners of said Gunnison County in exchange, at par, for valid floating indebtedness of said county outstanding prior to September 2, 1882, under and by virtue of and in full conformity with the provisions of an act of the General Assembly of the State of Colorado entitled 'An act to enable the several counties of the State to fund their floating indebtedness,' approved February 21, 1881; and it is hereby certified that all the requirements of law have been fully complied with by the proper officers in the issuing of this bond. It is further certified that the total amount of this issue does not exceed the limit prescribed by the Constitution of the State of Colorado, and that this issue of bonds has been authorized by a vote of a majority of the duly qualified electors of the said County of Gunnison, voting on the question at a general election, duly held in said county on the 7th day of November, A. D. 1882."

The defense relied on is that the bonds were issued in excess of the debt limit of the County as fixed by the Constitution of Colorado. There was by direction of the Circuit Court a verdict and judgment in that Court for the defendant. On writ of error, this judgment was reversed by the Circuit Court of Appeals, to which Court the present Writ of *Certiorari* issued from the Supreme Court.

The coupons in suit (amounting in all to $5,200) were taken from bonds Nos. 9 to 13, inclusive, Nos. 63 to 66, inclusive, and No. 98, of $1,000 each, aggregating $10,000 (Record, pp. 5, 33, 36). Plaintiff purchased these bonds from Joseph Standley and paid full value for them (Record, pp. 37, 98, 99). Said Joseph Standley had purchased said bonds for value as follows:

he had surrendered to the County warrants for $5,000 of the bonds and purchased the other $5,000 of bonds from Rollins & Young, for cash, in June, 1883 (Record, p. 36). Mr. Standley testified that he had no knowledge of the amount of bonds that were being issued by Gunnison County, in funding its debt, and no notice or knowledge that there was anything irregular or illegal about the issuance of the bonds; that for the bonds he purchased he paid 98 cents on the dollar, and that he was the owner, for value, of the warrants that were exchanged for the others; that he remained the owner of these ten bonds until June, 1892, when he sold them, together with certain coupons attached thereto, to plaintiff, for $14,000 (Record, pp. 36, 37, 98). He further testified that he was paid interest on the bonds; and he thought all coupons were paid up to and including coupon No. 6 and a part of No. 7 (Record, pp. 42, 43). This evidence, together with the coupons in suit, and a sample of one of the bonds, with evidence showing them to have all been the same in form, and some further testimony, showing the purchase of the bonds and the present ownership of these coupons, constituted plaintiff's case. It was admitted that prior to 1881 the assessed valuation of this county did not reach $1,000,000 (Record, p. 47).

THE DEFENDANT OFFERED IN EVIDENCE, and the Court admitted over the objection of plaintiff, the abstracts of the assessments for the years 1880, 1881 and 1882, which showed that the assessed valuation for 1880 was $596,583; in 1881, $1,266,962, and in 1882, $2,340,955 (Record, pp. 46, 47).

The defendant then offered in evidence a copy of a pretended financial statement for the six months ending December 31, 1881 (made under the Act of March

24, 1877, and not under the Act of February 21, 1881, recited in the bond), to which the following objections were made by the plaintiff, and to its admission an exception was saved (Record, pp. 47, 48):

"FIRST. The bonds having been issued on the 1st day of December, 1882, the semi-annual statement of June 30, 1882, would be the material statement, if any one would be, and this one is not material.

"SECOND. That it has not been shown that this semi-annual statement was published in a newspaper, or by posting, as the law requires, and that the recording thereof is only authorized in regard to a semi-annual statement that has thus been published.

"THIRD. That the statement on its face is not in compliance with the statute, and is not sufficient to bring home to the purchaser of bonds any actual knowledge of the indebtedness that is outstanding, and particularly any knowledge of the validity or invalidity of such indebtedness.

"FOURTH. Because the semi-annual statement provided by a certain statute is not required to be kept, either by the Constitution or by the statute under which these bonds were issued, and, therefore, the purchaser cannot be required to take any notice of the same.

"FIFTH. Because the funding act under which these bonds were issued vested in the Board of County Commissioners the power to compute the amount of the valid outstanding indebtedness of the county, and to make a certificate in reference thereto, and these bonds having recited on their face that they were issued to fund valid floating indebtedness, a purchaser would not be bound to investigate this record.

"SIXTH. Because this semi-annual statement offered in evidence does not attempt to show when the indebtedness mentioned therein was contracted, or whether it was contracted prior to the adoption of the Constitution or after such adoption, or whether it was contracted prior to the time the assessed valuation of the county reached a million dollars, or after that time, and that for these various reasons a purchaser would actually receive no notice or knowledge from the face of this semi-annual statement as to whether this indebtedness that was being funded by the issuance of these bonds was valid or invalid.

"SEVENTH. Because said indebtedness has been validated by constitutional amendment."

The Court nevertheless admitted said pretended financial statement in evidence marked "Exhibit G" (see Record, p. 108), to which ruling the plaintiff excepted (Record, p. 48). This ruling, as well as all of the other rulings below mentioned, was assigned as error in the Circuit Court of Appeals (Rec. pp. 158–162).

The defendant then offered in evidence a copy of another pretended financial statement for the six months ending June 30, 1882, and still another for the six months ending December 31, 1882. These documents were objected to for all the reasons above stated, and because this latter statement was made after the issuance of the bonds. These objections were all overruled, the evidence was admitted, and exceptions were duly saved (Record, p. 48). These statements (including the one first referred to) appear in the Record, at pages 108–121, as Exhibits G, H and I. The Court's charge shows that this evidence erroneously admitted, controlled the result (Record, pp. 69–71, 182). The Circuit Court of Appeals held that this testimony was erroneously admitted (Record, pp. 182–184).

The defendant next offered in evidence (Record, p. 48), a copy of the official proceedings of the Board under the funding act under which these bonds were issued, to which an objection was made as follows:

"We object to the introduction of these orders and proceedings of the Board of County Commissioners upon the ground that under the funding act a purchaser of bonds with recitals such as are contained in this bond would not be required to take notice of the procedure of the Board leading up to the actual issue and execution of the bonds; that the recitals in the bond as to the antecedent proceedings or the regular procedure will be conclusive."

This objection was overruled, the proceedings were admitted in evidence, and an exception was duly taken (Record, p. 49). Said proceedings appear in the record in this case, pages 121–135, as Exhibit J.

The defendant then introduced T. J. Maloney, who testified that while these bonds were all dated as of December 1, 1882, they were actually signed and delivered, from time to time, during a period of over one year from their date, as warrants came in to be exchanged for the bonds. The Treasurer did not countersign the bonds only as they were actually exchanged for warrants, which transaction went on during all the year 1883 and probably into 1884 (Record, pp. 50–53). This testimony was wholly uncontradicted.

The defendant then offered to prove (Record, p. 58) that the financial statements introduced in evidence are recorded in a book of the Gunnison County records, to which the plaintiff made the following objection:

"We object to this line of testimony to prove the nature of that book. The statute requires these semi-annual statements after they have been published, as I understand the law, to be recorded in a book kept for that purpose only. Now, whether a book would be in compliance with that statute could only be determined by some label or title upon it, and that can be best determined by an inspection, and I can see no reason why that book should not be brought here, as that was one of the issues in the case, as to whether any such book had been kept, so that the Court could, at least, see it, and determine as to whether that book was such a book as is contemplated by the statute."

This objection was overruled and an exception taken (Record, p. 58).

A Mr. McCormick was permitted to testify as to the nature and contents of this book (Record, p. 58). He was not certain (Record, pp. 63–65) that it was a book

kept in which to record semi-annual statements only, and could give no definite description thereof, and there was not a *scintilla* of testimony to the effect that the book was kept at the time these bonds were issued. The witness thought there were statements recorded therein of a date earlier than the ones in question, but as to when they were recorded there was no testimony.

The plaintiff again raised the question of the admissibility of this testimony by a motion to strike the same out, which the Court overruled, and exception was taken (Record, p. 65).

The defendant then offered (Record, p. 59) certain statements and lists of warrants, together with the warrants themselves, in exchange for which the funding bonds were issued, to which plaintiff made an objection as follows (Record, p. 59):

"We object to the introduction of these warrants and lists upon the ground that they do not distinguish in any manner as to what particular warrants Mr. Stanley exchanged for his first five bonds; and, second, that under the recitals in these bonds, and particularly as to any bonds purchased by Mr. Stanley for cash and in exchange for warrants, he is not required to take notice of the nature and character of the warrants, the dates or amounts or as to whether they were valid or invalid. Third, that the warrants, being merged in the bonds, if the bonds under their recital do not carry notice to a purchaser of the invalidity of any of this date entered into the funding, as represented by the funding bonds, then Mr. Stanley would not be impressed with notice of the invalidity of any particular warrant that may have been funded. And generally, that there is no statute or record that requires the purchaser of a bond to take notice of the warrants that have been funded; indeed, the law contemplates that these warrants, when taken in exchange for funding bonds, shall be destroyed."

Which objection the Court overruled and plaintiff excepted (Record, p. 59). The list of warrants constitutes Exhibit K (Record, pp. 135–147).

The defendant then offered in evidence a memorandum of warrants, which memorandum was said to have been used by a Mr. Seeley at the time he applied to exchange certain warrants for bonds, to which evidence plaintiff objected on the ground that a purchaser of bonds is not required to take any notice of such a memorandum, which objection the Court overruled and plaintiff excepted (Record, pp. 66). This memorandum was received in evidence as Exhibit L (Record, pp. 147–154).

The Circuit Court of Appeals held that the foregoing evidence was erroneously received (Record, p. 185).

At the close of the evidence for defendant, the plaintiff moved (Record, p. 67) to exclude these alleged semi-annual statements on the ground that it had not been shown that they were ever published as required by law. There was no attempt to show publication, either in a newspaper or by posting. This motion the Court overruled, holding that publication was unnecessary, and plaintiff excepted.

Thereupon (Record, p. 67) defendant moved that the Court instruct the jury to find a verdict for defendant. The Court then charged the jury at length, and concluded by instructing them to render a verdict for defendant, to which charge and instruction the plaintiff duly excepted, as stated below (Record, pp. 67-72).

Exceptions to the Charge of the Court.

Whereupon (Record, p. 72) counsel for complainant entered the following objections and exceptions to the instructions to the jury as given by the Court:

"The Court instructed the jury as follows:

"'There was considerable discussion in the Courts as to whether, if the county should recite in any obligation which it issued that it had complied with the terms of the Constitution and with the law of the State, and the indebtedness which had been created or which was recognized in the obligation issued was no more than was authorized under the Constitution, whether the county would be estopped by such a statement as that in the bond or other obligation that might be issued; and there were conflicting decisions in the Courts upon this subject, some of the Courts being inclined to follow the old rule which had been established in the early history of the subject, to the effect that if the municipal body recited the fulfillment of the conditions imposed upon it, it was thereby estopped from denying the fact; other Courts, perceiving that if there was an absence of power, if the county had no power to create an indebtedness, its declaration that it had such power could not be effective as a grant of power, and could not confer a power which did not exist; that there could be no rule of estoppel in any such case. And so we have it now settled that whatever the form of obligation which may be issued by a county, whatever may be declared in that obligation as to the conditions under which it is issued, the question whether the county had authority under the Constitution to issue such obligation is still open to investigation and consideration' (Record, pp. 68, 69).

"*To which charge the plaintiff objected*, upon the ground that the recital in a bond, to the effect that the same is valid and issued within the constitutional limitation, would work an estoppel the same as though such limitation were prescribed by a statutory provision, *which objection was by the Court overruled, to which ruling plaintiff then and there duly excepted*" (Record, p. 73).

(Record, p. 73 :) " The Court instructed the jury as follows :

" ' The act of the State, under which the bonds in question in this suit were issued, was passed in the year 1881. It is entitled, " An act to enable the several counties of the State to fund their floating indebtedness." In the act itself, in the title of the act and in the body of the act, the circumstance that the bonds issued pursuant to its terms are in settlement of pre-existing indebtedness is everywhere manifest. So that there is no room, in any controversy which may arise in respect to bonds issued under this act, for any contention that the bonds were issued to be sold for money in the market. They were to be issued only for funding purposes ; that is to say, to get the indebtedness existing upon the records of the county into one sum and to issue securities therefor. In the first section of the act, and towards the end of the section, it is provided that the whole amount of bonds issued under the act shall not exceed the sum of the county indebtedness at the date of the first publication of the aforementioned notice, and the amount shall be determined by the County Commissioners, and a certificate made of the same, and made a part of the records of the county. That is to say, in proceeding under the act, the County Commissioners, in the first place, were to ascertain the amount of the existing indebtedness of the county and to make a certificate of it and record the fact. Thus, they were required, by the act itself, to put upon record the amount of the indebtedness. There was an earlier act passed in the year 1877, four years earlier, which provided in its thirtieth section that the County Commissioners of each county should make semi-annual statements and publish the same in a newspaper, which statements shall show the amount of debt owing by the county, in what the debt consists, what payments—if any—have been made upon the same, the rate of interest, and so on. Also a detailed account of the receipts and expenditures of the county for the preceding months, and so on. And this statement is to be recorded in a book, to be kept by the Clerk of the Board for that purpose only. So that there were, at the time of these transactions, two acts requiring a record to be made of the indebtedness of the county, the act of 1877 requiring that this record should be made twice in each year, and the act of 1881

requiring that it should be made as a preliminary to the issue of bonds under the act. So that there is no room for controversy that there must be in the records of the county a statement and account of the indebtedness of the county. In any controversy this amount is one of the facts to be ascertained—that is to say, there must be, if a purchaser of bonds issued under the act of 1881 is to be charged with notice of facts which are to be ascertained in order to determine whether the constitutional provision has been complied with, a record of the indebtedness of the county.'

" *To which charge the plaintiff objected*, upon the grounds :

" FIRST. That said charge erroneously assumes and declares that the funding bonds in question were not negotiable securities or entitled, in the hands of *bona fide* purchasers, to protection as such.

" SECOND. That the Court erroneously assumes and declares that the purchaser of such bonds must know, at his peril, as against the recital therein, as to whether the amount of indebtedness stated in the certificate, made by the Board as a basis of the issuance of said bonds, is or is not valid indebtedness.

" THIRD. That the Court erroneously assumes that the purchaser of said bonds must take notice of the semi-annual statement provided for in an act separate and distinct from the act under which the bonds were issued.

" FOURTH. Because the Court erroneously assumes and declares that a purchaser, by an examination of said certificate and semi-annual statement, could ascertain that the indebtedness for which said funding bonds were being issued was invalid, because in excess of the constitutional limitation.

" *Which objection the Court overruled, and to which ruling the plaintiff then and there duly excepted*" (Record, p. 74).

(Record, p. 74 :) " The Court further charged the jury as follows :

" ' I have not called your attention before to the fact that the constitutional provision is that counties having a valuation of less than $1,000,000 shall not be subject

to its provisions, so that in the year 1880 there was no limitation to the County of Gunnison in respect to its indebtedness, but there was such a limitation in 1881 and 1882, at the time the bonds in suit were issued. In the discussion of these questions before the Court, counsel seemed disposed to contend that under the constitutional provision there might be an indebtedness created in each year, to the extent specified in the Constitution, whether there was any pre-existing indebtedness or not, and that the indebtedness incurred prior to the year 1881 should not be counted as part of the indebtedness existing in the year 1882, at the time these bonds were issued. There is no ground for such position. The Constitution does not at all mean that the county may, in each year, incur an indebtedness of 6 mills in the dollar or of 12 mills in the dollar, of the valuation of its property, but that the indebtedness shall at no time exceed that—that is to say, whether the indebtedness be created in one way or another, it stands as an aggregate at the time of issuing any securities, and if at that time it exceeds the constitutional limit, then there is no power to create any indebtedness whatever. But if that were not true, and if the rule be as counsel contends, the semi-annual statements put in evidence before you show that the increase in the years 1881 and 1882 was greatly in excess of the constitutional limit.'

" *To which charge the plaintiff objected upon the ground* that the Court erroneously assumes and declares that said funding bonds would be invalid if the aggregate amount thereof exceeded the constitutional limitation, irrespective of whether the indebtedness accrued prior or subsequent to the assessed valuation of said county reaching the sum of $1,000,000 (Record, p. 75).

" The Court further instructed the jury as follows:

" ' A question has been made as to whether the bonds issued in this case—I believe there were about $175,000 of them –that is the amount of indebtedness which the Commissioners found to be existing on the 1st of September, 1882, when they made up their accounts for issuing the bonds. A question has been made whether the bonds may not be valid in some part—that is, as to the part for which the county was really bound upon the warrants, because certainly there were some of the warrants valid, and the remainder to be void under the

Constitution. Counsel stated that there was in the year 1882 property in the county to incur an indebtedness of $28,000, or something like that, referring to the constitutional provision and the assessed valuation of the property within the county. And so there was some disposition upon the part of counsel to contend that there were at least this amount of bonds which can be recognized as valid and subsisting obligations of the county, even if the remainder shall be rejected. Some of these bonds in suit are of numbers which might fall below that sum; as, I believe, there were nine to thirteen which would be below $28,000, and then there were sixty-five to sixty-nine, or some number in the sixties, which would be far beyond it, and ninety-eight, which is still farther along in the dim distance. But we cannot go upon any such principle as that. The rule established in the Courts, is that if, of a series of obligations issued there may be any of them void, the Court cannot distinguish between them' (Record, p. 75).

"*To which charge the plaintiff objected upon the ground* that the evidence in the case shows that the said bonds were issued and delivered from time to time in exchange for warrants as they were presented, and, therefore, cannot be considered as having all been of one and the same issue (Record, p. 75).

"The Court further instructed the jury as follows:

"'Some question has been made also whether the plaintiff here may be regarded as an innocent purchaser of the bonds for value. If it were necessary to ascertain that fact it would, perhaps, be a matter of some difficulty. Mr. Stanley, who first came to the possession of the bonds as a holder for value, held warrants which were funded in the bonds to the extent of one-half of them, $5,000. I am inclined to think that he would not be an innocent purchaser in respect to the bonds which he obtained for those warrants. He would stand in the same position in regard to the bonds as he held in respect to the warrants which he gave in exchange for the bonds. He purchased the other $5,000 from Rollins and Young, and Rollins and Young were pretty familiar with the condition of affairs over there. They got all of the bonds, or nearly all of them, in exchange for warrants which they surrendered. Afterwards, the present plaintiff, who is the legal and perhaps natural heir of Rollins and Young, repurchased the bonds. Whether the plaintiff,

having first obtained the bonds in exchange for warrants, and afterwards repurchased them from Mr. Stanley, could now stand as an innocent purchaser, would be a matter of some difficulty if we were required to solve it in this action, but we are not concerned about that matter because the rule applicable to the case is that, if the records of the county disclose facts which show that the bonds were invalid under the constitutional provision, an innocent purchaser and every purchaser must take notice of those facts—in other words, he is bound to examine the records with a view to inform himself as to the power of the county, before he makes a purchase of the bonds. Not doing so, he is held to have purchased them with full knowledge of whatever is disclosed in the records, and in this instance the record of the county abundantly shows the amount of the indebtedness and the assessed valuation of the property of the county' (Record, pp. 75, 76).

" *To which charge plaintiff objected*, upon the grounds:

" FIRST. That the plaintiff in this case is shown to be a *bona fide* purchaser, for the reason that it holds under a *bona fide* purchaser.

" SECOND. That Stanley, having parted with his warrants in exchange for said bonds, which warrants can no longer be traced or identified, he must be considered as holding the bonds received therefor upon a valuable consideration.

" THIRD. That the evidence shows that the other five bonds were purchased by Stanley for cash, without any notice or knowledge of any fact affecting their validity.

" FOURTH. That the Court erroneously declares that the records, which said purchaser should have examined, show the invalidity of said bonds (Record, p. 76).

" The Court further instructed the jury as follows:

" 'We come to the conclusion, then, gentlemen, as a matter of law, that, upon the facts fully explained in the evidence, the plaintiff is not entitled to recover; therefore, you are relieved from determining some questions of fact which it was thought in the beginning it might be necessary to take your opinion of. We shall be compelled to ask you to render a verdict for the defendant.'

" *To which charge and to the ruling of the Court requiring the jury to find a verdict for the defendant, plaintiff then and there duly excepted.*

"Whereupon the Court entered judgment for the defendant, and to which judgment the plaintiff then and there duly excepted" (Record, p. 76).

The plaintiff obtained a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit and duly perfected the said appeal (Record, pp. 158, 164, 165).

THE ASSIGNMENT OF ERRORS which were filed by the plaintiff on that writ of error appear at length in the Record, and cover all of the plaintiff's exceptions taken on the trial (pp. 158-162).

MOTION TO AMEND BILL OF EXCEPTIONS SO AS TO HAVE IT EXPRESSLY STATE THAT IT CONTAINS ALL THE EVIDENCE.—Afterwards and before the hearing of the case in the United States Circuit Court of Appeals the plaintiff filed notice of motion to amend the bill of exceptions so as to have it expressly state that it contained all the evidence (Record, pp. 168, 169). In support of such motion the plaintiff filed affidavits, among others, affidavit of the stenographer who took the evidence introduced on the trial, to the effect that the bill of exceptions contained all such evidence (Record, p. 171). This motion was denied by the United States Circuit Court of Appeals (Record, p. 173), on the ground that any order which might be made by that court would not confer any authority upon the Circuit Court in addition to that which the Circuit Court now has to amend the bill of exceptions. The court also seemed to intimate, although we understand that it did not expressly decide, that the trial court had lost the power to amend the bill of exceptions by the lapse of the term at which the final judgment was entered.

THE BILL OF EXCEPTIONS ON ITS FACE SHOWS THAT IT CONTAINS ALL THE EVIDENCE.—We shall show later on in

the argument of this case that the bill of exceptions does as a matter of fact show on its face that it contains all the evidence.

The United States Circuit Court of Appeals heard the case on the writ of error, and by unanimous decision reversed the decision of the Circuit Court, and remanded the cause for a new trial (Record, p. 186). The opinion of the United States Circuit Court of Appeals appears in the Record (pp. 177–186).

PETITION BY DEFENDANT TO THE UNITED STATES SUPREME COURT FOR CERTIORARI TO BRING THE SAID CASE TO THIS COURT.—Afterwards the defendant the Board of County Commissioners of Gunnison County filed in this court a petition for a writ of *certiorari* to bring to this court for review the decision of the United States Circuit Court of Appeals, which writ was granted, and the record has been accordingly returned (Record, pp. 188–190).

ARGUMENT.

I.

Before proceeding to the examination of the questions arising on the record in which we shall show that the plaintiffs are clearly entitled to recover judgment on the obligations of the defendant county now here in question, we may here state briefly that *moral* justice and equity and fair dealing equally entitle the plaintiff to such recovery.

The defendant Gunnison county incurred certain indebtedness for legitimate county

purposes, and issued its warrants for such indebtedness.

See the list of certain warrants indicating the purposes for which they were issued (Record, pp. 109–115); also, see the purposes for which the indebtedness was incurred, as shown by the so-called financial statements (Record, pp. 108–120). All of this indebtedness was thus incurred for strictly county purposes. It was in good faith incurred by a rapidly growing county for the discharge of its public duties imposed upon it by law, and the county and the people of the county got the benefit of every dollar of it. No fraud or failure of consideration was attempted to be proved.

Vote of the people of the county. Not only did the county thus obtain the full benefit of every dollar of the indebtedness thus incurred for strictly county purposes, but the question was submitted to a vote of the people of the county whether or not the indebtedness thus incurred should be funded by the issue of the very bonds now here in question, and the people, at an election held on Tuesday, November 7, 1882, by a vote of 277 votes "for funding county debt" and 10 votes "against funding county debt," voted in favor of funding said debt (Record, p. 132). The question put to the qualified electors was distinctly (Record, p. 130), "Whether the board of county commissioners of said county shall issue bonds of said county under the provisions of the said act of the general assembly in exchange, at par, for the warrants of said county," &c. Afterwards, pursuant to, and expressly authorized by, such vote of the people, the county commissioners issued the funding bonds now in question.

If the county ever intended to question or repudiate, or attempted to question or repudiate, this indebtedness, that would have been the time for it to do so; but, instead of doing so, the people of the county, by their vote, with practical unanimity, agreed that this indebtedness should be paid, and that funding bonds should be issued therefor.

We may here pause to quote from the language of the late Chief-Justice of this court in the somewhat similar case of *Jasper County vs. Ballou*, 103 U. S., 745—language which is especially pertinent to the facts just stated. Mr. Chief-Justice WAITE, giving the unanimous opinion of this court, there said (p. 751):

"When, therefore, the people were called on to vote whether the old bonds should be funded, the facts they had to consider were these: A valid law authorizing the subscription and an issue of the bonds had been passed. The people, at an election which had been irregularly called, had voted to make the subscription and issue bonds bearing ten per cent. interest, and all payable within six years. An act had been passed to legalize the election, and under it the subscription which had been voted was made, and bonds such as were contemplated had been issued and were then outstanding in the hands of various parties. Whether these bonds were valid was, so far as any direct decisions were concerned, an open question, and certainly not free from doubt. Under these circumstances the question was directly put to the people of the county, in a manner authorized by law, whether they would recognize these bonds as 'binding and subsisting legal obligations,' and issue in lieu of them other bonds having twenty years to run and bearing seven per cent. interest instead of ten; and they, by their vote, said they would. There is no complaint of any illegality in this election, or of fraud or imposition. So far as the record shows, the proposition to fund went from the county authorities to the bondholders, and not from the bondholders to the county. The facts were as well known to one party as the other. If the people intended to rely on their defenses to the old bonds, then

was their time for them to speak and by their vote say they would not recognize them as binding obligations. By voting the other way, they, in effect, accepted them as legal and subsisting for the purposes of the proposed extension of time at reduced interest, and said to the holders, if their proposition was accepted, no question of illegality would be raised. Their offer having been accepted, they are now estopped from insisting upon an irregularity which they have by their votes voluntarily waived, with a full knowledge of the facts. The case is clearly, as we think, within the principle acted on by the Supreme Court of the State in *President and Trustees of the Town of Keithsburg vs. Frick, 34 Ill., 405.* **As was very properly said below by the learned circuit judge, 'there must be an end of these contests and defenses some time or other.' There must be a time when the people in their political capacity are concluded by their contracts as much as individuals, and we think that where the people of a county, at an election held accaccording to law, authorize their corporate or political representatives to treat certain outstanding county obligations as 'properly authorized by law' for the purpose of negotiating a settlement with the holders, and the settlement which was contemplated has been made, all contests as to the validity of the obligations must be considered as ended.**

"This disposes of all questions as to the excessive issue of bonds. For all the purposes of this case the original bonds must be taken as binding. The issue of the funding bonds did not increase the aggregate of the indebtedness of the corporation, but only changed its form."

So, also, the language of this Court in the case of *Graves vs. Saline County,* 161 U. S., 359, is likewise especially pertinent. Mr. Justice SHIRAS, giving the unanimous opinion of this Court, there says with regard to certain refunding bonds of Saline County (in that case refunding void bonds) (p. 374):

"But when, in pursuance of the funding laws, the question whether the outstanding original bonds issued to the Belleville and Eldorado Railroad Company should be refunded in new bonds was submitted to the same constituent body that authorized the original issue, and when, in accordance with the vote so taken, and in formal compliance with the other directions of the funding laws, negotiable securities were issued and delivered in payment of the outstanding bonds, we know of no principle of law which forbids the county of Saline from such honorable discharge of its liabilities in the hands of innocent holders. Such action on the part of the legal voters of Saline County may well be regarded as a declaration that there had been, by the actual construction of the railroad and the delivery of the stock, a substantial compliance with the original conditions. After such deliberate action, it is now too late for Saline County to seek the aid of a court of equity to enable it to avoid its contracts made in pursuance of a legislative grant of power, and the consideration of which has been received."

The history of the particular bonds now here in question shows also the justice of the plaintiff's claim for judgment. It was proved that Joseph Standley obtained $5,000 of the bonds, the interest on which is now sued for in this action, by exchanging therefor warrants of the defendant County of Gunnison issued for strictly county purposes and for full value as above stated (Record, pp. 36, 37); and that the said Joseph Standley purchased the other $5,000 of bonds from Rollins & Young, municipal bond dealers, paying therefor 98 cents on the dollar. Standley testifies (Record, p. 36): "I had some warrants, and when the county funded I turned in my warrants for bonds 9 to 13." He also testifies (Record, p. 36) that he had no knowledge of the amount of bonds that were being issued by Gunnison County in funding, and had no notice or knowledge that there was anything irregular or illegal about the issuance of the bonds (Rec., p. 36).

The case therefore stands as follows: Mr. Standley having certain warrants goes, on the County's invitation, to the county commissioners and says: "I hear you are proposing to issue funding bonds in exchange for warrants." The county commissioners say: "Yes; we have been authorized to do so by the act of the legislature and by the practically unanimous vote of the people of the county; here are the bonds." And the county commissioners execute and deliver to Standley in exchange for his warrants which the County still holds the solemn obligations of the county, issued under its seal, signed by its duly elected and duly accredited officers representing the county. This bond acknowledges its indebtedness to the bearer and promises to pay. The bond further contains this express and definite recital (Record, p. 2):

"This bond is issued by the Board of County Commissioners of said Gunnison county in exchange, at par, for valid floating indebtedness of the said county outstanding prior to September 2, 1882, under and by virtue of and in full conformity with the provisions of an Act of the General Assembly of the State of Colorado, entitled 'An Act to enable the several counties of the State to fund their floating indebtedness,' approved February 21, 1881; and it is hereby certified that all the requirements of law have been fully complied with by the proper officers in the issuing of this bond. It is further certified that the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado, and that this issue of bonds has been authorized by a vote of a majority of the duly-qualified electors of the said county of Gunnison, voting on the question at a general election duly held in said county on the seventh day of November, A. D. 1882."

The County not only holds the warrants which Standley surrendered, but its counsel on the trial

claimed to produce, among others, these warrants for the purpose of defeating a recovery on the bonds!

Mr. Standley afterwards purchased $5,000 of similar bonds.

On these facts and on this record the officers of the county attempt to repudiate these bonds, and now ask this court to sanction such attempted repudiation, and to affix to a judgment in favor of the county the *imprimatur* of its approval. Is this honesty or justice or fair dealing? There can be but one answer to the question. Will this court lend its sanction to such conduct on the part of the county? Clearly it will not do so unless it is constrained by inexorable principles of law. Moreover, such repudiation is against the purpose and spirit of the Constitutional Amendment of 1888 (see Appendix hereto). We proceed now to a consideration of the several legal questions involved in this case, and to show that the strict legal right of the matter is in this case as in most others on the same side of the controversy on which stand moral justice and equity.

II.

Objections by Counsel for County that the record presented no question for review by Circuit Court of Appeals, examined and shown to have no foundation.

It is objected by Counsel for the County that the bill of exceptions does not contain all the evidence;

and then, that because of such supposed fact there was no question presented for review.

We submit in the first place that the bill of exceptions does show that it contains all the evidence.

(a) The record shows that the bill of exceptions contains all of the evidence which was given on the trial of the case. This fact need not be shown in any particular or technical form. It is enough if it appears to the satisfaction of the court from an inspection of the bill of exceptions, and from the statements therein made.

If we examine this bill of exceptions we shall see that the cause came on for trial Tuesday, May 19, 1896 (Record, pp. 31, 32). It also appears (Record, p. 33) that "the complainants, to sustain the issues on their part, offered *the following* oral and documentary evidence." Then follows without any break the evidence offered on behalf of the complainants down to page 45 of the record; and then appears the entry, "*Whereupon* complainants rested;" and then the entry, "*Thereupon* the defendants, to sustain the issues herein joined on their part, produced *the following* evidence." Note the language in both instances: "*The following* evidence;" not "the following, *among other evidence*," but "*the following* evidence." Then follows without any break the evidence given on behalf of the defendant until the entry (Record, p. 66), "*Whereupon* the further proceedings herein were continued until the 20th day of May, A. D. 1896, at ten o'clock A. M." Then immediately following is the entry (Record, p. 67), "Wednesday, May 20, at ten A. M., the further trial of this cause was continued as

follows." Then appear some discussions and motion of counsel, and then the entry (Record, p. 67), "*Thereupon*, counsel for defendant made a formal motion under the evidence as offered on both sides, that the court instruct the jury to return a verdict for the defendant, whereupon the court instructed the jury as follows."

It thus appears from an inspection of the bill of exceptions itself, and of the statements therein contained, that such bill of exceptions contains all of the evidence offered on the trial of this case. By the introductory and connecting words, by the character of the testimony as reported, and by the expressive words "whereupon" and "thereupon" no reader can doubt that the bill of exceptions does, in fact, contain all of the evidence.

In *Spangler vs. Green*, 21 Colo., 505, 511, the court says:

"It is true that the bill of exceptions does not contain an express statement that all the evidence introduced at the trial has been certified up, but at the close of the evidence offered in behalf of the Chicago Lumber Co. the statement is that 'thereupon said Chicago Lumber Co. rested its testimony' and at the close of Ackroyd & Co.'s case it is 'Ackroyd & Co. here rested their testimony,' and at the close of appellant's case the statement is 'defendant, Jane Spangler, here closed her testimony.' These expressions are equivalent to that usually found in a bill of exceptions to the effect that all the testimony taken was preserved" *(Iron Wood Store Co. vs. Harrison*, 75 Mich., 197; *Hitchcock vs. Burgett*, 38 Mich., 501*)*.

It was shown, beyond dispute, that the bill of exceptions did, in fact, contain all the evidence (Rec., pp. 168–171).

In the proceedings to amend the bill of exceptions the counsel for the County did not controvert the

proposition that the bill of exceptions did, in point of fact, contain all the evidence.

But even if it should be held that the bill of exceptions does not show that it contains all the evidence, the case was clearly reviewable by the Circuit Court of Appeals.

(b) The instructions to the jury duly excepted to were reviewable by the Circuit Court of Appeals, and are open to consideration in this court.

See these exceptions, Record, pp. 72–76, and this brief, *supra*, pp. 9–15.

We find that it is objected by the counsel for the county, and also held by the United States Circuit Court of Appeals, that it could not review any of the exceptions which were taken to the charge of the said court, because the trial Court expressed the logical result of its several erroneous statements of law in the form of a peremptory direction to the jury to return a verdict for the defendant (Record, p. 181). We respectfully submit that this is not the law. The higher court may review such portions of the charge of the lower court to the jury as incorrectly state the law, and as are duly objected and excepted to at the time. This is always the rule. Especially may this be done where the trial court concludes by directing the jury to find a verdict against the party who makes such objections and exceptions. This precise point was determined in the case of *Anderson vs. Bock*, 15 How., 323 (where the bill of exceptions did not contain all the evidence), where plaintiff requested certain instructions, which were refused and the ruling excepted to, and the court

then gave a peremptory instruction to the jury to find for the defendant.

It is, to say the least, a novel proposition that, after the court has charged the jury erroneously, and the plaintiff has objected and pointed out specific objections to the charge, and duly excepted thereto, then the court can cure those specific objections by concluding with a peremptory direction (the mere concrete result of such erroneous views) to return a verdict against the party who makes the objection and exception. We say, on the contrary, that this furnishes all the more reason for reviewing and reversing the judgment and granting a new trial, because it is thus made perfectly manifest that the trial court thereby committed error, and that such error directly brought about the erroneous and unjust result.

In order to review the charge of the court, or portions of the charge of the court, upon a matter of law, it is not necessary to insert in the record either (1) the entire evidence (*Anderson vs. Bock*, 15 How., 323, *supra*), or (2) the entire charge to the jury.

That the *entire evidence* need not be set out in the record in such case was early decided in this court in *Pennock vs. Dialogue*, 2 Pet., 1, where STORY, J., giving the opinion of the court, said (p. 15):

> "There was not the slightest necessity of putting any portion of the evidence in this case upon the record, since the opinion of the court delivered to the jury presented a general principle of law, and the application of the evidence to it was left to the jury."

That the *entire charge to the jury* need not be set out in the record in such case was likewise early decided in this court in *Stimpson vs. West Shore Railroad Company*, 3 How., 553, where TANEY, Ch. J., giving the

opinion of the court, refers to the rule of this court, which is the present rule No. 4, and which provides that "the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts."

As was well said by this court in the case of *Worthington vs. Mason*, 101 U. S., 149:

"The judge can not be permitted to cure the error of his law proposition by assuming as facts what may not have been proved. This very part of the charge was excepted to by the plaintiffs in error on the ground that its law was erroneous. * * * The proof of the facts which made the charge erroneous must be distinctly set forth, or it must appear that evidence was given tending to prove them."

Applying the principles there stated to the present case, there were facts in the record showing conclusively, as we say (or, at the very least, *tending* to show, which would entitle the plaintiff to go to a jury), that the plaintiff was a *bona fide* holder of the bonds in question, and on this state of facts the charge made by the judge to the jury in the particulars pointed out was clearly erroneous.

That a part of the charge which is erroneous may be reviewed without reference to the remaining parts of the charge has always been held by this court; for example, in *United States vs. Rindskopf*, 105 U. S., 418, where Mr. Justice FIELD says (p. 421):

"The bill of exceptions in this case sets forth the charge of the court below in full in disregard of our frequent condemnation of this practice. Only the parts to which the exceptions relate should have been given. All else is unnecessary and produces only inconvenience."

If this be sound, then it must follow that it is immaterial what the remainder of the charge to the

jury may have been, unless the remaining charge to the jury be inserted and it be shown that the court in the remainder of its charge cured the error complained of. Instead of any such thing being shown in the present case, the court went on to make its error worse by giving a peremptory instruction to the jury to find a verdict for the defendant.

A very pertinent case also is *Ward vs. Cochran*, 150 U. S., 597, where this court, Mr. Justice SHIRAS giving the opinion, says (p. 608):

"In the present case, even if the verdict were regarded as a general one, and therefore entitled to be supported by the presumption that sufficient facts existed to sustain it, yet we should feel constrained to reverse the judgment because of the errors complained of in the eighth, ninth and tenth assignments."

All of the eight, ninth and tenth assignments referred to related to instructions to the jury. The court after considering these erroneous instructions said (p. 610):

"Nor do we think this is one of those cases in which erroneous or insufficient instructions in one part of a charge are corrected or supplied by unobjectionable instructions on the same questions appearing in another part."

(c) There were errors in the admission of the evidence; and the rulings of the court which were duly objected and excepted to at the time were reviewable by the Circuit Court of Appeals.

See these exceptions stated in detail in this brief, *supra*, pp. 3-8.

When evidence is erroneously offered and received, it is presumed, in the absence of any contrary showing

in the record, that this error affected the result, and a judgment must be reversed. We understand that the counsel for the county urges the argument that every presumption is in favor of the verdict and judgment. This presumption, however, does not exist as against an error in the admission or rejection of evidence, and whenever evidence is erroneously admitted or rejected and the objection to the same is duly pointed out at the time and exception duly taken, the presumption in favor of the correctness of the verdict and judgment ceases to exist. The burden then lies on the party who says that no injury was produced by the erroneous ruling as to the admission or rejection of evidence to show from the record that such error did not and could not affect the result.

It is not necessary for the plaintiff in error in such case any more than in any other to cause to be inserted the whole of the evidence which was given on the trial.

The rule on this subject is well stated in the case of *Vicksburg and Meridian Railroad Company vs. O'Brien*, 119 U. S. 99, where Mr. Justice HARLAN, giving the opinion of the court, said (p. 103):

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of party against whom it was committed, it is well settled that *a reversal will be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party.*" (Cases cited.)

In the case of *Mexia vs. Oliver*, 148 U. S., 664, the record contained a bill of exceptions, which seems not to have brought up all the evidence. The bill of exceptions showed the fact that certain evidence was admitted over the objection and exception of the plaintiff,

and this Court reversed the judgment for that reason, saying (p. 673):

"We cannot say that these errors were immaterial, as *it does not appear beyond doubt that they were errors which could not prejudice the rights of the plaintiffs*" (Cases cited).

That rulings on the admission of evidence during the progress of the trial are reviewable although the court itself decides the case, see *Norris vs. Jackson*, 9 Wall., 125, where the court says the same rule applies in this respect in actions at law whether they be tried by the court without a jury or by the court with a jury and a general verdict be rendered.

In the case of *Lincoln vs. Claflin*, 7 Wall., 132, Mr. Justice FIELD, giving the opinion of this court, says (p. 136):

"A bill of exceptions should only present the rulings of the court upon some matter of law—as upon the admission or exclusion of evidence—and *should contain only so much of the testimony*, or such a statement off the proofs made or offered, *as may be necessary to explain the bearing of the rulings upon the issues involved.* If the facts upon which the rulings were made are admitted, the bill should state them briefly as the result of the testimony. If the facts are disputed, it will be sufficient if the bill allege that testimony was produced tending to prove them."

See, also, to the same effect, per BREWER, J., *Lees vs. United States*, 150 U. S., 476, 482; and the case *Hickman vs. Jones*, 9 Wall., 197, 199.

In the case of *Michigan Insurance Bank vs. Eldred*, 143 U. S., 293, the trial court gave a *peremptory instruction* to find in favor of the defendant. The case was reversed by this court *on exceptions to the admission of evidence.* Mr. Justice GRAY, giving the opinion of the court, says (p. 300):

"The admission of this evidence was objected to by the plaintiff, upon the very ground that it did not prove the non-existence of the plaintiff as a corporation; and an exception to its admission was duly taken and noted, and embodied in the bill of exceptions.

"The plaintiff afterwards renewed the objection, by moving 'that all of the defendant's evidence by stricken out, for the reason, if it be assumed to be correct, it has not made out any case.' The reason assigned by the judge for refusing to grant this motion was his erroneous opinion that on the proof as it stood 'the Michigan Insurance Bank became defunct and ceased to exist in 1865, when the national bank was organized;' and the plaintiff again expected in due form.

"Although the subsequent proceedings had at the trial, and stated in the original bill of exceptions, do not appear on this record to have been excepted to, yet those proceedings may properly be considered for the purpose of showing, as they do beyond doubt, that the judge's rulings in favor of the defendant proceeded solely upon the incompetent evidence to the admission and consideration of which the plaintiff had persistently excepted."

Clearly, the court in examining on writ of error as to the admissibility of evidence has a right to examine, in connection with the evidence objected to, whatever evidence appears in the bill of exceptions, in order to see its bearing on the admissibility of the evidence offered, and this is true whether the bill of exceptions contains *all* of the evidence, or whether it contains only a *part* of the evidence. And if it appears to the satisfaction of the higher court from the evidence which is contained in the bill of exceptions that the trial court committed error, then the higher court will not presume that there is other evidence which does not appear in the bill of exceptions which would counteract and overcome the evidence which is contained therein. On the contrary, the rule is, as stated in the above authorities, that the judgment will be

reversed unless it appear "*beyond doubt*" that the error in admitting or rejecting evidence did not and could not produce injury to the party excepting.

III.

Plaintiff was a bona fide holder of the coupons in question, and must be so considered in passing upon the exceptions to the rulings upon admission of evidence, and to the instructions to the jury.

(1) It is presumed that plaintiff (the bonds being negotiable) is a bona fide holder, that is, a purchaser for value without notice, in the absence of any showing to the contrary.

In *San Antonio vs. Mehaffy*, 96 U. S., 312, this court, Mr. Justice SWAYNE delivering the opinion, said (p. 314):

"The holder of commercial paper, in the absence of proof to the contrary, is presumed to have taken it underdue for a valuable consideration and without notice of any objection to which it was liable (2 Pars. Bills and Notes, 9; *Pinkerton vs. Bailey*, 8 Wend., N. Y., 600).

"There is certainly nothing in the record which shows that such is not the position of the defendant in error.

"This shuts the door, as matter of law, to all inquiry touching the regularity of the proceedings of the officers charged with the duty of subscribing and making payment in the way prescribed. The rule in such cases is that, if the municipality could have had the power under any circumstances to issue the securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the

authority, and they are no more liable to be impeached in his hands for any infirmity than any other commercial paper *(Supervisors vs. Schenck*, 5 Wall., 772; *San Antonio vs. Lane*, 32 Tex., 405*)*."

Lexington vs. Butler, 14 Wall., 282.
Macon County vs. Shores, 97 U. S., 272.
Montclair vs. Ramsdell, 107 U. S., 147.

(2) It was pleaded and proved that plaintiff was a bona fide holder, that is, paid value and had no notice of any alleged illegality.

See Complaint, Record, p. 6; Testimony, Record, pp. 36, 37, 98, 99; also this brief, *supra*, pp. 2–3.

This evidence was not disputed, and no evidence was offered to contradict it; but, if there had been any, then plaintiff was, at least, entitled to go to the jury on the question of weight of evidence.

A *bona fide* holder is a purchaser for value without notice, or the successor of one who was such purchaser.

McClure vs. Oxford Twp., 94 U. S., 429.

If any previous holder of the bonds in suit was a *bona fide* holder for value, the plaintiff can avail himself of such previous holder's position without showing that he has himself paid value.

Montclair vs. Ramsdell, 107 U. S., 147.

Though he may have notice of infirmities in its origin, a purchaser of a municipal bond from a *bona fide* holder before maturity takes it as free from such infirmities as it was in the hands of such holder.

Cromwell vs. Sac County, 96 U. S., 51.
Douglas County vs. Bolles, 94 U. S. 104.
Marion County vs. Clark, 94 U. S., 278.
San Antonio vs. Mehaffy, 96 U. S., 312.
City of Nauvoo vs. Ritter, 97 U. S., 389.

(3) The burden of establishing the fact that the plaintiff had any actual notice was upon the county; and, if it claimed that this fact was established "beyond doubt" upon the trial, it should have caused such parts of any evidence as it claims established that fact "beyond doubt" to be inserted in the bill of exceptions, to show that the erroneous admission of the evidence which plaintiff complains of produced no injury.

See, on this point, the cases in this brief, *supra*, pp. 29–31.

(4) The whole bill of exceptions assumes, and the trial court in its charge assumes, that the plaintiff had no actual notice, and that the only notice which was claimed either by the counsel for the county or by the trial court was constructive notice.

The remarks of this Court, in *Shepherd vs. Baltimore and Ohio Railroad Company*, 130 U. S., 426, are appropriate here. The fact in that case was that the trial court had given a peremptory direction to find a verdict for the defendant. It was also the fact that, during the progress of the trial, the plaintiff had offered certain evidence which the court had improperly excluded. It was objected by the defendant in error that the plaintiff would have no right to recover in any event, because there was no proof in the record as to his ownership of the property in question, which ownership had been denied by the defendant in its answer. This court, Mr. Justice HARLAN giving the opinion, says (p. 434):

"This objection is too technical and cannot be sustained, as the property is repeatedly referred to in the record as being owned by the plaintiff, and the court so assumed in its rulings."

So we say in the present case, that the trial court im-

properly admitted evidence which was not good as against the plaintiff as the *bona fide* holder of these coupons; and, for the reasons above stated, the counsel for the county is mistaken in asserting that it does not appear that the plaintiff was such a *bona fide* holder.

Plaintiff had no notice from bond numbers of any excessive issue of bonds.

The defendant undertook to make the point that the bonds are numbered and divided into series A, B and C, and from this fact to impute some notice to plaintiff. Precisely the same thing was true in the case of *Chaffee County vs. Potter*, 142 U. S., 355, as an inspection of the bond set forth in the report of that case will show. The courts have, however, frequently decided that the numbers on municipal bonds are not a material part of the bonds, and that they may even be altered or erased without affecting the validity of the bonds in the hands of *bona fide* holder.

Birdsall vs. Russell, 29 N. Y., 220;
Commonwealth vs. Emigrants' Industrial Savings Bank, 98 Mass., 12;
City of Elizabeth vs. Force, 29 N. J. Eq., 587.

But, in any event the numbers on the bonds in question in the present case did not on any theory give the holder any notice of any excessive issue of bonds.

The numbers of the bonds the coupons of which are in question in the present case are 9 to 13, 63 to 66 and 98. The indebtedness of Gunnison County on the assessed valuation for the year 1892, might have been $140,448.30, which is six mills on the dollar of the assessed valuation of $2,343,955. Therefore, even if

the plaintiff were bound to take notice that all of the $98,000 of bonds were outstanding, and even if in addition some of the series B and C were outstanding, the total amount might still be within the debt limit. Therefore, the plaintiff did not on any theory have any notice from the face of the bond that the total amount of the issue exceeded the debt limit prescribed by the constitution of the State of Colorado.

The learned counsel for the county seems to have attempted to make the argument that the holder of the coupons is not entitled to the benefit of any recital in the bonds. We hardly think the learned counsel can be serious in advancing this proposition. It is enough to say in regard to it that it is refuted by scores of decisions in this court, in many of which the court has expressly decided that the holder of the coupons must take notice of what is contained in the bonds, and is entitled to the benefit of any recitals in the bonds.

In connection with this the learned counsel for the county seeks to make the point that the coupons now in question do not refer specifically and at length to the bonds. It is a sufficient answer to this proposition to say that the coupons in question in the case of *Chaffee County vs. Potter*, 142 U. S., 355, were precisely like the coupons now in question.

The plaintiff Standley was a bona fide holder of the $5,000 of bonds received by him in exchange for warrants which he surrendered to Gunnison County.

He paid value for the said bonds, namely, he surrendered his warrants, and he had no notice of any irregularity or fraud or any illegality in the issue of

the bonds. That the person who first takes bonds from a municipal corporation under such circumstances, as well as any subsequent taker, may be a *bona fide* purchaser for value is well settled by the decisions of this court in *Commissioners vs. Bolles*, 94 U. S., 104, and *Montclair vs. Ramsdell*, 107 U. S., 147. In this latter case this court said, Mr. Justice HARLAN giving the opinion (p. 160):

"This question was directly adjudged in *Commissioners vs. Bolles*, 94 U. S., 104. One of the issues there was whether the plaintiff was a *bona fide* holder of certain municipal bonds. After stating that the legal presumption was that they were, the court, speaking by Mr. Justice STRONG, said: 'But the plaintiffs are not forced to rest upon mere presumption to support their claim to be considered as having the rights of purchasers without notice of any defense. They can call to their aid the fact that their predecessors in ownership were such purchasers. To the rights of those predecessors they have succeeded. **Certainly the railroad company paid for the bonds and coupons by paying an equal amount of their stock, which the county now holds; and nothing in the special facts found shows that the company knew of any irregularity or fraud in their issue.' The court proceeded: 'And still more, the contractor for building the railroad received the bonds from the county in payment for his work, either in whole or in part, after his work had been completed. There is no pretense that he had notice of anything that should have made him doubt their validity. Why was he not a bona fide purchaser for value? The law is undoubted, that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights.'**"

The Circuit Court held that even if the plaintiff was a *bona fide* holder for value, without actual notice of any defense, he could not recover, and directed a

verdict for the County (Rec., p. 72). And this is the capital error in the case as it is the purpose of this argument to show.

IV.

The recital in the bonds in question, "that the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado," is conclusive as an estoppel in favor of the plaintiff as a bona fide holder of the coupons in question.

We might here cite the decision of this court in the case of *Chaffee County vs. Potter*, 142 U. S., 355, a case which was decided under this very clause of the constitution of Colorado, and with precisely the same recital in the bond, and make no more argument under this proposition. Inasmuch, however, as the counsel for the county has undertaken to question the correctness of this proposition and of the said decision of this court, we proceed to consider the matter somewhat at length.

County Officers Have Power to Make Recitals.

The main proposition advanced by the counsel for the county seems to be that under the constitution of Colorado the county officers have no power under any possible circumstances to make any recital in the

bonds as to the constitutional debt limit which will in any way bind the county. On this proposition is based all their argument to avoid the effect of the above quoted specific and positive recital in the bonds.

We may, in the first place, call the attention of the court to the inconsistency of the arguments of the counsel for the county. They say in one breath that the county officers have no power to make recitals as to the constitutional debt limit because under the constitution they have no power to determine what is indebtedness of the county; but in the next breath they say that the county officers made certain "financial statements" of the indebtedness of the county, and they offer these statements in evidence as showing the indebtedness of the county for the purpose of proving that the county was beyond the constitutional debt limit. Both their propositions can not possibly be true. If the county officers have no power to determine the indebtedness of the county as respects the constitutional debt limit, they have no power as respects the constitutional debt limit, to make any "financial statements" which shall include any statement of the indebtedness of the county. We are now dealing with the power to make any determination, not with the question whether the determination as made is correct or incorrect. That cannot affect the question of the power to make the determination. When, therefore, our opponents introduce in evidence these so-called financial statements to prove that the constitutional debt limit is exceeded, they themselves thereby admit and affirm that as respects the said constitutional debt limit the county officers have power to decide and determine what is the amount of the county debt. There can be no distinction as respects

the constitution whether such determination be set forth in the recital in the bond, or, whether such determination be set forth in a so-called financial statement filed in the county clerk's office. Our opponents thereby completely disprove their own proposition, which is that the county officers have no power to make recital in the bonds as to the constitutional debt limit, because they have no power to determine what are the debts of the county.

But the learned counsel for the county are clearly in error in advancing the proposition that the county officers have no power to make a determination as to the indebtedness, which determination shall bind the county. As we understand their argument, it is substantially this: That the constitution provides that the debt shall not exceed a certain percentage of the assessed valuation, and the counsel then say that the statutes, therefore, have no power to confer upon any officers of the county the power to determine what is indebtedness or what is the assessed valuation. In other words, inasmuch as this is a *constitutional* debt limit, the *statutes* cannot confer upon any body of men any power to make recitals as to whether or not the limit is exceeded. It is to be observed in regard to their argument that the logic of it would require that no executive, legislative or administrative officers, or any persons or tribunal, except a court, can determine either what is indebtedness of the county or what is its assessed valuation, and that the hands of the officers of the county are completely tied as respects the exercise of the usual functions of officers by this provision of the constitution. Their argument assumes that the officers of the county thus have their usual functions

taken away from them without any express provision to that effect in the constitution.

We submit that such argument will not bear examination. The debt limit provision of the constitution does not take away or attempt to take away from county officers their usual and proper functions. To listen to the argument of the learned counsel for the county, one would think that counties and county officers and all their functions were derived solely from legislative enactment, and that the legislature had, by some statute especially enacted for that purpose, attempted to confer upon county officers special and express power to recite away the provisions of the constitution, and that the learned counsel for the county were arguing against the constitutionality of such statute. The fact is, however, that counties and county officers are recognized and provided for in the constitution itself, and the constitution contemplates that they shall perform the usual and proper functions of county officers, and represent the county in the county's affairs. The constitution of Colorado has an entire article on Counties—Article XIV. It provides, among other things:

SECTION 6. "In each county there shall be elected for the term of three years three county commissioners, who shall hold sessions for the transaction of county business as provided by law."

SECTION 8. "There shall be elected in each county * * * one county clerk, who shall be *ex officio* recorder of deeds and clerk of the board of county commissioners, one sheriff, one coroner, one treasurer," &c.

SECTION 12. "The general assembly shall provide for the election or appointment of such other county, township, precinct and municipal officers as public convenience may require."

The fact is, therefore, that the *Constitution* of Colorado constitutes the county commissioners, county clerk, county treasurer and other officers the officers of the county to act for and on its behalf in the matter of county affairs. They are not constituted by statute, as the argument of the learned counsel for the county would seem to imply, but by the constitution itsef.

Note that these provisions as to counties and county officers were inserted in the constitution *at the very same time* as the provisions in regard to the debt limitation of counties. It seems perfectly clear that the constitution contemplated that the county officers should act for and represent the county in regard to the incurring of county indebtedness, as well as in regard to all other county affairs. Certainly no exception is made in the constitution to prevent their so doing. The rule of construction is that all of the provisions of the constitution must be construed together, and, as the constitution clearly contemplates that the county officers are to act *generally* for the counties, there is no exception that they shall not act for and represent the counties in respect of incurring county debt unless such exception be expressly stated in the constitution.

The constitution, therefore, contemplates that these officers shall act for the county, and that they shall make contracts for the county. Can there be any doubt that, if the legislature should authorize county officers to make a contract for the building of a court house or jail, or for any other proper county purpose, these officers would not have the power to bind the county by such a contract, by its provisions and its recitals, and thus to estop the county? Certainly not. So, also, in the case of a claim against the county the county offi-

cers would clearly have power, so far as the constitution is concerned, to act for the county in adjusting a claim and making payment of it. Their acts and contracts in this respect would bind and estop the county. Precisely the same principles apply as to all other matters of the county committed to the county officers. In other words, the county officers represent the county. The constitution in substance and effect so provides. The whole scheme of government so provides. There is no other administrative or executive body to represent the county, or to speak for the county in county matters. The argument of the learned counsel for the county necessarily goes to the length of holding that there is no body of men authorized to speak for the county so as to bind the county in the matter of incurring county debt. If the constitution had intended any such thing, then it would have been very easy so expressly to provide. In the absence of any such provision, it must necessarily be assumed that county officers are to represent the county as respects the incurring of debt as well as in respect to all other matters.

But the learned counsel for the county say that the view which we have here stated is open to the objection that the county officers may abuse their powers. So they may. They may steal the money of the county; they may waste the money; they may make improper contracts and abuse their powers in many ways. So may any officers of the State, or the officers of any political subdivision of the State. But was it ever before heard that because such abuse may sometimes occur, therefore the officers in abusing their powers do not represent the county? When it comes to the question whether the county shall suffer for the

unlawful acts of its officers elected by the people of the county and representing the people of the county, or whether the innocent persons who have dealt in good faith with the county as represented by its accredited officers, there can be but one answer—the county should suffer if any one must. This is right and just both morally and legally, for the people of the county elect their own officers, and have it in their power to choose officers on whom they are willing to rely, and presumably they do so. Having chosen their own officers and agents, and having held them out to the public as their duly accredited officers and agents, the people of the county and the county alike by every principle of law and morality are bound and estopped by the acts and representations of such officers and agents as against innocent third persons with whom they have dealt in county matters. The county and the people of the county hold out their officers as representing the county, and cannot be heard to assert the contrary. In the view here stated the remedy of the county, if the officers abuse their trust, is clear—namely, to take more interest in public affairs, to examine into the character and fitness of their candidates, and to elect better men. If they elect bad men knowingly, or without investigation, they have only themselves to blame, and they only suffer for their own folly. The fact is that in our system of popular government the tendency of the people to neglect all public affairs, and to neglect to inquire into the character and fitness of their candidates for office, and supinely to rely upon some provision in the constitution to overcome all that their officers thus elected may do on their behalf, needs the wholesome check now and then of the people suffering,

if need be, some loss because of the dishonesty or incapacity of officers thus carelessly elected.

But in view of our opponents, what is the remedy? They say, let the innocent third person suffer for the acts of the county officers rather than let the people of the county, who elected the officers, and who thus hold them out as the county's representatives.

But be it noted that the people of the defendant county specfically voted at a public election, provided for by law, for the issue of these very bonds.

Chaffee County case settles the power to make the recital contained in the bonds in suit.

But, as already stated, we do not need to argue on principle the proposition that the recital in the bonds in question, "that the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado," is conclusive as an estoppel in favor of the *bona fide* holder of the bonds in question.

This precise proposition has been decided by this court in *Chaffee County vs. Potter*, 142 U. S., 355, and has never been departed from in any case in this court. In fact, **the recital in the bond in Chaffee County vs. Potter was word for word exactly like the recital in the bond in the present case**—to wit: "*It is further certified that the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado*" (p. 357; Record in the present case, p. 2).

The court distinguished the case of *Lake County vs. Graham*, 130 U. S., 674, and *Dixon County vs. Field*, 111 U. S., 83, saying (p. 362):

"We held in that case [*Lake County vs. Graham*] that the county was not estopped from pleading the constitutional limitation, because there was no recital in the bonds in regard to it, and because, also, the bonds showing upon their face that they were issued to the amount of $500,000, the purchaser, having that data before him, was bound to ascertain from the records the total assessed valuation of the taxable property of the county, and determine for himself, by a simple arithmetical calculation, whether the issue was in harmony with the constitution; and that the bonds, having been issued in violation of that provision of the constitution, were not valid obligations of the county. Our decision was based largely upon the ruling of this court in *Dixon County vs. Field*, 111 U. S., 83. To the views expressed in that case we still adhere; and the only question for us now to consider, therefore, is: *Do the additional recital in these bonds, above set out, and the absence from their face of anything showing the total number issued of each series, and the total amount in all, estop the county from pleading the constitutional limitation?*

"In our opinion these two features are of vital importance in distinguishing this case from *Lake County vs. Graham* and *Dixon County vs. Field*, and are sufficient to operate as an estoppel against the county."

The recitals in these bonds in the case now under consideration cannot be disputed upon any such evidence as was presented in this case.

In *Buchanan vs. Litchfield*, 102 U. S., 278, the Court said (p. 292):

"Had the statute restricted the exercise of the authority therein conferred to those municipal corporations whose *indebtedness did not*, at the time, *exceed the constitutional limit*, there would have been ground for holding that the city could not, as against the plaintiff, dispute the *fair inference to be drawn* from such recital or statement *as to the extent of its existing indebtedness*."

In *School District vs. Stone*, 106 U. S., 183, the Court said (p. 185):

"Had the bonds recited that they were issued by authority of the election of July 31, 1869, and in *conformity with the provisions of* the statute referred to, there would, in view of the decisions of this Court, be more force in the argument in behalf of the defendant in error. * * * And we should, then, be obliged to decide whether, in view of the constitutional provision, a false recital by the School Board as to the value of the taxable property would conclude the district as between it and a *bona fide* purchaser for value; for, in such case, since the statute itself contains, substantially, the same limitation upon indebtedness by independent school districts as is prescribed by the State Constitution for county or other political or municipal corporations, a distinct recital that the bonds where issued *in conformity with the statute would fairly import a compliance with the Constitution.*"

In *Sherman County vs. Simons*, 109 U. S., 735, the Court said (p. 737):

"The defendant in error is found by the Circuit Court to be a *bona fide* holder for value. According to repeated decisions of this Court, being such, he was not bound to go behind the *law and the recital* of the bonds *to inquire into the amount of the county indebtedness.*"

In *Dallas County vs. McKenzie*, 110 U. S., 686, the Court said:

"In *Marcy vs. Township of Oswego*, 92 U. S., 637, and *Humboldt Township vs. Long, Ib.*, 642, followed in *Wilson vs. Salamanca*, 99 U. S., 499, it was expressly decided that municipal bonds were not invalid in the hands of a *bona fide* holder, *by reason of their having been voted and issued in excess of the statutory limit, if the recitals imported a valid issue.*"

In *Dixon County vs. Field*, 111 U. S., 83, the Court, while deciding that a purchaser had to take notice of the *assessed valuation* of a county, said (p. 95):

"The case is to be distinguished from *Marcy vs. Township of Oswego*, 92 U. S., 637, where, although it was provided that the amount of the bonds voted by any

township should not be above such a sum as would require a levy of more than one per cent. per annum on the taxable property of such township to pay the yearly interest, it was held that the existence of sufficient taxable property to warrant the amount of the subscription and issue, it not being designated as fixed by the assessment, was one of those prerequisite facts to the execution and issue of the bonds, which was of a nature that required examination and decision, and had been referred by the statute to the *inquiry and determination of the Board.* In *Sherman County vs. Simons*, 109 U. S., 735, the County Commissioners were constituted by the statute the tribunal for the purpose of determining the *amount of the indebtedness*, in excess of which the bonds were not to be issued, and their decision was accordingly held to be conclusive."

It must not be understood that the statutes, in the cases referred to above, *by express terms* delegated power to the Board to make these determinations. They did not do so any more definitely than in the case at bar. And that was sufficient. *Bernard's Township vs. Morrison*, 133 U. S., 523.

In *Buchanan vs. Litchfield*, 102 U. S., 278, arising under a Constitutional limitation of indebtedness in Illinois, the Court said (p. 289):

"But in what way was the purchaser to ascertain the extent of the city's indebtedness existing at the time the bonds in question were issued? The extent of that indebtedness was *a fact peculiarly within the knowledge* of the constituted authorities of the city. It was necessarily left, *both by the Constitution and the statute of 1873 to their examination and determination*, under the constitutional injunction, however, that no municipal corporation should exceed the prescribed amount of indebtedness. It was, nevertheless, *a fact which*, so far as we are advised by the record, could not at all times and absolutely, or with reasonable certainty, be ascertained from any official documents to which the public had access. A like difficulty, perhaps, would arise in the case of any municipal corporation possessing the general power of raising money, by taxation and otherwise, to carry on local government."

In *Chaffee County vs. Potter*, 142 U. S., 355, the Court said (p. 363):

"True, if a purchaser had seen the whole issue of each series of bonds and then compared it with the assessment roll, he might have been able to discover whether the issue exceeded the amount of indebtedness limited by the Constitution. But that is not the test to apply to a transaction of this nature. It is not supposed that any one person would purchase all the bonds at one time, as that is not the usual course of business of this kind. The test is: What does *each individual bond disclose?* If the face of one of the bonds had disclosed that, as a matter of fact, the recital in it, with respect to the constitutional limitation, was false, of course, the county would not be bound by that recital, and would not be estopped from pleading the invalidity of the bonds in this particular. Such was the case in *Lake County vs. Graham* and *Dixon County vs. Field.* But that is not the case."

The Court then proceeds in the *Chaffee County* case to state its conclusion and the principle on which it rests, and which we maintain fully covers the case at the bar. The language of this Court is as follows:

"Here, by virtue of the statute under which the bonds were issued, the County Commissioners were to determine the amount to be issued, which was not to exceed the total amount of the indebtedness at the date of the first publication of the notice requesting the holders of county warrants to exchange their warrants for bonds, at par. The statute, in terms, gave to the Commissioners the determination of a fact—that is, whether the issue of bonds was in accordance with the Constitution of the State and the statute under which they were issued, and required them to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination has been made and that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, under the law, estops the county from saying that it is untrue. *Town of Coloma vs. Eaves*, 92 U. S., 484; *Town of Venice vs. Murdock*, 92 U. S., 494; *Marcy vs.*

Township of Oswego, 92 U. S., 637; *Wilson vs. Salamanca*, 99 U. S., 499; *Buchanan vs. Litchfield*, 102 U. S., 278; *Northern Bank vs. Porter Township*, 110 U. S., 608."

It is impossible to affirm the judgment of the Circuit Court in favor of the County without overruling the *Chaffee County* case.

V.

The recital in the bond in question, that it is issued "for VALID floating indebtedness of the said county," creates an estoppel, which is conclusive in favor of the bona fide holder of such bonds.

The bonds in question thus recite that they are issued for a lawful purpose, namely, to refund *valid* floating indebtedness. We have already pointed out the fact that the question of issuing these bonds to fund outstanding warrants of the county was submitted to a vote of the people of the county, and they voted almost unanimously to issue these bonds. They were issued; and they contain the recital that they are issued "for *valid* floating indebtedness of the said county."

That such a recital estops the county to say that the warrants funded were invalid is well settled both on principle and authority. We have already called the attention of the court in this brief, *supra*, page 18, to the decision of this court in *Jasper County vs.*

Ballou, 103 U. S., 745, a case directly in point. The court there says (p. 752):

"If the people intended to rely on their defenses to the old bonds, then was their time for them to speak, and by their vote say they would not recognize them as binding obligations. By voting the other way they, in effect, accepted them as legal, and subsisting for the purposes of the proposed extention of time at reduced interest, and said to the holders, if their proposition was accepted no question of illegality would be raised. Their offer having been accepted, they are now estoped from insisting upon an irregularity which they have by their votes voluntarily waived with a full knowledge of the facts. The case is clearly, as we think, within the principle acted on by the Supreme Court of the State in *President and Trustees of the Town of Keithsburg vs. Frick, 34 Ill., 405.* As was very properly said below by the learned circuit judge, 'There must be an end of these contests and defenses some time or other.' There must be a time when the people in their political capacity are concluded by their contracts as much as individuals, and we think that where the people of a county, at an election held according to law, authorize their corporate or political representatives to treat certain outstanding county obligations as 'properly authorized by law' for the purpose of negotiating a settlement with the holders, and the settlement which was contemplated has been made, all contests as to the validity of the obligations must be considered as ended.

"This disposes of all questions as to the excessive issue of bonds. For all the purposes of this case the original bonds must be taken as binding."

So, also, the recent case of *Graves vs. Saline County*, 161 U. S., 359, is directly in point. In that case this Court, Mr. Justice SHIRAS giving the opinion, referred with approval to the decision in the case of *Jasper County vs. Ballou*, 103 U. S., 745, and decided the *Saline County case* in exactly the same way.

In that case *Saline County*, Illinois, on a vote of its people, issued refunding bonds to refund, among

others, $25,000 bonds originally issued by the county to the Belleville and Eldorado Railroad Company, which bonds, under the decision of this court in *German Savings Bank vs. Franklin County*, 128 U. S., 526, and the decision of the Supreme Court of Illinois in the case of *Town of Eagle vs. Kohn*, 84 Ill., 292, were *absolutely void even in the hands of bona fide purchasers for value* (p. 362). Such refunding bonds contained this recital:

"This bond is one of a series of like tenor and issued for the purpose of funding and retiring certain binding, subsisting legal obligations of said county, which remain outstanding and unpaid, under the provisions of an act [here citing the funding act] and in pursuance of a vote of a majority of the legal voters of said county voting at an election legally called under said act the 6th day of November, 1883. We hereby certify that all the requirements of said acts have been fully complied with in the issue thereof. In testimony whereof," &c.

We repeat that this case as well as the case of *Jasper County vs. Ballou*, *Supra*, which it follows, fully covers the case of Gunnison County, Colorado, at the bar, even if the defendant's contention is right that the warrants were void. For in the *Graves case* the bonds of Saline County which were funded were declared to be void even in the hands of *bona fide* purchasers; and what can be "deader" than a bond that is held by the Supreme Court of the United States and the Supreme Court of Illinois to be absolutely void in the hands of *bona fide* purchasers for value without notice? The exact point *in Saline County vs. Graves* is that a bond issued by vote of the people to refund such a bond as that is good in the hands of a *bona fide* holder, especially where the refunding bond recites that it is issued to refund a valid obliga-

tion. It is not within the power of any ingenuity or casuistry to distinguish that case from this, even if it be conceded that the warrants in this case surrendered for the refunding bonds were void, a proposition, however, which we contest in other portions of the brief (See extract from Judge SHIRAS' opinion, *ante* pp. 19-20).

There have also been several decisions in the United States Circuit Court of Appeals to the same effect:

City of Huron vs. Second Ward Savings Bank, 86 Fed. Rep., 272.

West Plains Township vs. Sage, 32 U. S. App., 725.

Kiowa County vs. Howard, 49 U. S. App., 642.

City of Cadillac vs. Woonsocket Institution for Savings, 16 U. S. App., 546.

National Life Insurance Company vs. Board of Education, 27 U. S. App., 244.

The principle, too, is well settled that the fact that a municipal corporation has diverted the proceeds of its negotiable securities from the lawful purpose for which they appear on their face to have been issued to an unlawful purpose is no defense to an action against the person who had no knowledge of or part in the diversion.

Anderson County vs. Beal, 113 U. S., 227.
Cairo vs. Zane, 149 U. S., 122.

To hold that a purchaser of municipal bonds must trace back to its very origin the indebtedness which is represented thereby, especially when the recitals in the funding bonds are that they are issued for valid indebtedness, is to put upon such *bona fide* holder a burden which, as a practical matter, he can not possibly sustain. As is well known, most municipal indebt-

edness is not paid when it becomes due, but is refunded again and again, usually at lower rates of interest. Refunding bonds are universally and most naturally understood not to be impeachable on the ground that the debt thus refunded is not valid, especially if the refunding bonds have been specifically authorized by a vote of the people. As was said by this Court in the case of *Jasper County vs. Ballou*, 103 U. S., 745, at the time of such proposed refunding, it is the duty of the municipality to speak out, if it ever intends to do so, and then to challenge and contest the indebtedness instead of refunding it; but if it does not do this, but on the contrary recognizes it as its valid indebtedness, and goes further, as in the present case, and by the vote of the people of the county expressly authorizes its refunding, and then the county officers pursuant to such vote effect such refunding, and recite in the refunding bonds which are issued that they are issued for *valid* indebtedness, every principle of law and morality requires that the county be forever estopped from asserting as against a *bona fide* holder any supposed illegality of the original indebtedness.

These funding bonds in suit in the case at bar were not on any theory invalid upon their face. They did not show on their face the total amount of the issue. But a purchaser might know the total amount of bonds that had been issued, and the assessed valuation of 1882, and, nevertheless, could form no correct opinion as to the validity thereof. The issue of bonds to pay off or refund an existing indebtedness does not increase the debt or create a new debt. It merely changes the form of an old debt.

Powell vs. Madison, 107 Ind., 106.

Farson, L. & Co. vs. Louisville, 30 S. W., 17 (Ky.).
Miller vs. School District, etc., 39 Pac., 879 (Wyoming).
City of Poughkeepsie vs. Quintard, 136 N. Y.
Marion County vs. Harvey County, 26 Kansas, 181.
Blanton vs. Commissioners McDowell County, 101 N. C., 532.
Los Angeles vs. Field, 112 Cal., 319.
Sioux City vs. Weare, 59 Iowa, 95.
Opinion of Justices, 81 Maine, 602.

All of the floating indebtedness of the defendant county which was incurred prior to the assessment of 1881, not being subject to any debt limitation of the Constitution, was valid, and could be legally funded.

The Supreme Court of Colorado has so decided in *Lake County vs. Standley*, 49 Pac., Rep., 23.

See, also, to the same effect, *Powell vs. City of Madison*, 107 Ind., 106.

The Circuit Court permitted defendant county, over the plaintiff's objection and exception, to go behind the assessment of 1882, behind the face of the bonds, and behind the act under which they were issued, and into the assessed valuations and financial statements of prior years, made under another statute than the one recited in the bond, for the purpose of ascertaining whether this floating indebtedness, represented by county warrants, was valid or not. In other words, the Court below entered, against the plaintiff's objection and exception, upon the trial of the question of the

validity of these county warrants (which might all be valid or not, depending on the time when the debts were created which were represented by the warrants) with the view of holding the purchaser of the funding bonds to notice and knowledge which he could not derive from the face of the bonds, the Constitution, assessed valuation, the statute under which the bonds were issued or any other statute. This cannot be done as against a *bona fide* holder of bonds containing such recitals as these bonds contain.

In *Chaffee County vs. Potter*, 142 U. S., 355, the Court said (p. 363):

"The purchaser might even know—indeed, it may be admitted that he would be required to know—the assessed valuation of the taxable property of the county, and yet he could not ascertain, by reference to one of the bonds and the assessment roll, whether the county had exceeded its power, under the Constitution, in the premises. True, if a purchaser had seen the whole issue of each series of bonds, and then compared it with the assessment roll, he might have been able to discover whether the issue exceeded the amount of indebtedness limited by the Constitution. But that is not the test to apply to a transaction of this nature."

But we respectfully suggest and show that the Court is mistaken, however, in the *Chaffee County case* in the *arguendo* observation that a purchaser with full knowledge of the total amount of the issue of the funding bonds in the Chaffee County case and the assessed valuation could discover whether the issue exceeded the limitation or not. Before he could make any such discovery, or be certain of that fact, he would, under the language of the constitution of Colorado, quoted below, and the recent decision of the Supreme Court of Colorado construing such language (*Lake Co. vs. Standley*, 49 Pac.

Rep., 23), have to go back into the warrant indebtedness, and ascertain **when it arose, and whether or not it was affected by the constitutional limitation.** The date of the warrants would not control this question. **A warrant is an evidence of a preceding indebtedness,** and, as we have before stated, all of this indebtedness that arose before the completion of the valuation by the Board of Equalization on September 1, 1881, was in no manner affected by the constitutional limitation, for the reason that, until that time, the assessed valuation did not reach $1,000,000.

The language of the constitution limits

" the aggregate amount of indebtedness of any county for all purposes, *exclusive of debts contracted before the adoption of this constitution.*"

The section making the limitation also expressly provides

" That this section shall not apply to counties having a valuation of less than $1,000,000,"

so that the limitation did not apply to any indebtedness incurred by Gunnison County until the valuation reached $1,000,000 which was not until September 1, 1881 (Record, pp. 46, 47).

It is in this aspect of the case that the specific and positive recitals, to the effect that these bonds are within the constitutional debt limitation, and that they were issued to fund *valid floating* indebtedness, have controlling and inexpugnable force. It could not be seen from the Constitution, the assessed valuation and the whole issue of bonds, that these recitals were false. There would be nothing on the face of these bonds, even if they had recited the full amount

of the issue (as they did not), which, taken with the assessed valuation and the constitutional provision, would have shown that the recital was false.

Opposing counsel refer in support of the defendants' contention to the case of *Lake County vs. Graham*, 130 U. S., 674, which was an action upon certain bonds issued by Lake County under the act of February 21, 1881. The vital and controlling distinction between the case of *Lake County vs. Graham*, on the one hand, and *Chaffee County vs. Potter* and the case at bar, on the other, is this :

1. In the *Graham case* the funding bond contained no recital that the constitutional debt limit had not been exceeded, the court saying on this point (pp. 680, 681) :

> The bond containing " no express reference to the Constitution nor any statement that the constitutional requirements have been observed, there is, therefore, no question as to the constitutional language, because there is no recital in regard to it."

2. It contained no recital that it was issued to fund valid floating indebtedness.

3. Each bond in the *Graham case* recited that the issue amounted to $500,000, which when compared with the assessed valuation made each bond show on its face that it was in excess of the limit prescribed by the Constitution.

4. The decision in that case was rendered on an agreed stipulation to the effect (p. 676) that if—

> " Section 6 of article 11 of the Constitution is a limitation upon the power of the defendant county to contract any and all indebtedness, including all such as sued upon in this section, then it is admitted that the claimed indebtedness was incurred after the limitation prescribed by the constitution had been reached and exceeded by the defendant the County of Lake ; and in

that case and for the purposes of the action it is admitted that the defendant [Lake County] is entitled to judgment thereon, unless defendant is estopped from making such defense by the recitals contained on the face of the bonds and the coupons sued on in this action."

This court having held that the debt limitation provision of the Constitution applied to ordinary warrant indebtedness as well as indebtedness created by bonds, then by the stipulation the county was entitled to judgment, unless the court should further hold that the recitals in the bonds estopped the county from making the defense. But the court, on looking at the bond, found that there were no recitals either that it was issued to fund a valid debt or that the amount of the bond did not exceed the debt limit prescribed by the Constitution; and it further found that the statute of February 21, 1881, itself, under which the bonds were issued, did not prescribe any limitation such as that contained in the Constitution. Under these circumstances the Supreme Court decided that the county was not estopped.

Answering the suggestion made in that case that the bondholder was not chargeable with knowledge that the limit of the Constitution had been exceeded the court said (p. 683):

"To the suggestion that the purchaser was not chargeable with knowledge of the fact that the maximum of 12 mills on the dollar had been exceeded—for the $500,000 of debt ascertained to be due on the day of notice, and for which bonds were issued, might have been partly or wholly created before the Constitution was adopted, and, therefore, be excluded from the rule by the very terms of the Constitution itself—there are two decisive answers. *First*, the bill of exceptions shows that the debt was not so created, either in whole or in part. *Second*, the defendant in error is not en-

titled to an estoppel even if such an inference might have been drawn from the recital of conformity."

Such recital of conformity being only that the bond was issued in conformity with the act of February 21, 1881, which act contained no debt limitation like the one contained in the Constitution. An equally conclusive answer would have been that no such question was in the record, since the stipulation on which the case was decided took any such question out of the case.

VI.

The so-called "financial statements" cannot be introduced in evidence as against the bona fide holder of the bonds in question containing such recitals as these bonds contain.

We have printed in full in the appendix to this brief that section of the Act of March 24, 1877, to wit, Section 30, which provides for the county commissioners making certain semi-annual financial statements.

These financial statements should not have been admitted in evidence for several reasons:

(1) Because the bonds in the present case, like the bonds in the case of Chaffee County vs. Potter, and unlike the bonds in the case of Sutliff vs. Lake County, were ISSUED UNDER ANOTHER AND DIFFERENT STATUTE *from the one which required the so-called financial statements to be made--to wit, under the funding act of Feb-*

ruary 21, 1881 (which statute is also printed in the appendix to this brief).

This distinction was pointed out by the Court of Appeals in this case (Record, pp. 182, 183) and the same distinction was pointed out by this court in *Sutliff vs. Lake County*, 147 U. S., 230, in commenting upon *Chaffee County vs. Potter*. 142 U. S., 355, which latter case was in this respect precisely like the present case.

We regard this objection to the admission of the so-called " financial statements " as fatal. The Funding Act of 1881 recited in the bonds covers the whole subject of funding floating indebtedness, and the said act of March 24, 1877, has no application to these Funding Bonds.

(2) Because the bonds in the present case, like the bonds in the case of Chaffee County vs. Potter, and unlike the bonds in the case of Sutliff vs. Lake County, contain AN EXPRESS RECITAL *" That the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado."*

The estoppel produced by the specific recital in the bonds made directly to the investor and intended to influence his action, cannot be overcome by statements or representations made at other times and for other purposes, and not in connection with the issue of the bonds, and which never came to the notice of the bondholder. The recital in the bond is addressed by the county to every person who becomes a holder of the bonds. It was intended to be acted upon by the bondholder, and it was acted upon by the bondholder, and that is the statement which binds and estops the county. What may have been stated by the

county officers at other and different times in connection with other and different matters and for other and different purposes under the requirements of another and different statute, is wholly immaterial in view of these express and solemn recitals in the bonds themselves.

This Court held that the bonds involved in *Sutliff vs. Lake County*, 147 U. S., 230 *contained no recital that the debt limitation prescribed by the constitution had not been exceeded*, and the bonds in question in that case were issued under the act of March 24, 1877, which required by said Section 30 of said Act a statement of the indebtedness of the county to be entered upon the county records.

The present case in this respect is precisely like the case of Chaffee County vs. Potter, 142 U. S., 355, which was thus distinguished in the case of Sutliff vs. Lake County, 147 U. S., 230.

The bonds in question in the present case were issued under the same statute as the bonds in the case of *Chaffee County vs. Potter*, to wit, under the Act February 21, 1881; and the court in giving its opinion in the *Sutliff* case, expressly distinguished that case as follows *(Sutliff vs. Lake County*, 147 U. S., 230, 237*)*:

"That decision [*Dixon County vs. Field*, 111 U. S., 83] and the grounds upon which it rests, were approved and affirmed in *Lake County vs. Graham* and *Chaffee County vs. Potter*, above cited, each of which arose under the article of the constitution of Colorado now in question, *but under a different statute* [to wit, the Act of February 21, 1881], which did not require the amount of indebtedness of the county to

be stated on its records. In *Lake County vs. Graham* each bond showed on its face the whole amount of bonds issued and the recorded valuation of property showed that amount to be in excess of the constitutional limit, and for this reason as well as *because the bonds contained no recital upon that point*, the county was held not to be estopped to plead that limit (130 U. S., 682, 683). In *Chaffee County vs. Potter*, on the other hand, the bonds contained an express recital that the total amount of the issue did not exceed the constitutional limit and did not show on their face the amount of the issue and the county records showed only the valuation of property."

On principle and authority the so-called "financial statements" were not constructive notice to the plaintiff.

We might well stop here our argument on this proposition by citing the *Chaffee County* decision of this Court; but in view of the importance of the principles and questions involved in the question of the admission in evidence of these so-called "financial statements" as against a *bona fide* holder of bonds containing recitals like the present, we have thought it due to the court to state more fully the arguments and views which we believe to be sound with regard to the character of such so-called financial statements as constructive notice and the question of their admissibility in evidence, both generally and with special regard to the facts of the present case.

In the absence of such recital it may be held that the plaintiff in the case of *Sutliff vs. Lake County* (on bonds issued under the Act of March 24, 1887) was obliged to take notice of the semi-annual statements if duly recorded; and hence we need not, in this case, maintain that that case, on honds issued under the

Act of March 24, 1877, on the facts and statute before the court, was not correctly decided. The court, in its opinion in that case, referred to these financial statements as a part of the public records of the county, and, possibly from that fact, some misunderstanding apparently existed in the mind of the Circuit Court in the present case as to the character and effect of these "financial statements" as parts of the public records of the county. The statute which provides for the making of these "financial statements" *does not anywhere describe that they shall be constructive notice of anything to anybody.* The statute merely provides that these statements "shall also be entered of record by the clerk of the board of county commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times." The statute, therefore, merely makes these financial statements when entered in a book kept for that purpose only part of the records of the county. And this is all that the case of *Sutliff vs. Lake County* decided. It is evident that this court in that case did not decide, or undertake to decide, that any holder of bonds with such recitals as the present in regard to the debt limit was obliged to consult the county records for any purpose, or that he had constructive notice of them.

The recent decisions of this court on the further point in question conclusively establish this fact.

Case of Evansville vs. Dennett, 161 U. S., 434, and its controlling application to the present case.

The United States Circuit Court of Appeals for the Seventh Circuit had held, in the case of *Post vs. Pulaski County*, 9 U. S. App., 1, and we believe had held, also, in other cases, that the *bona fide* holder of negotiable bonds containing full recitals was, nevertheless, bound to consult the records of the county, including, among other things, the orders and other proceedings under which the bonds were issued, and held, in effect, that he had constructive notice of such public records. At length, however, and after several such decisions, the judges of that court united in certifying up to the Supreme Court of the United States certain questions with a view to obtaining the final and conclusive ruling of this court as to whether or not the holder of bonds, with full recitals, was obliged to take notice or had constructive notice of the public records of the county or other municipality issuing bonds; and this court rendered its decision on that subject in the case of *Evansville vs. Dennett*, 161 U. S., 434, and the decision of this court in that case has settled conclusively and forever the fact that such *bona fide* holder of municipal bonds containing full recitals is not obliged to consult the public records of the county, nor does he have constructive notice of what is contained in such records. The recital in the case of the bonds issued by the City of Evansville was that they were issued " in pursuance of an act of the legislature of the State of Indiana and ordinances of the city council of the said city passed in pursuance

thereof." One series of bonds involved in that case recited that they were issued "*by virtue of a resolution of said City Council passed May 23,*" *1870*" thus mentioning specifically the date of the resolution; and yet this Court held that a *bona fide* purchaser of such bonds did not have constructive notice of such resolution, though duly entered on the official records of the City.

In the case of *Evansville vs. Dennett*, 161 U. S., 434, referred to *supra*, the questions propounded by the Circuit Court of Appeals to the Supreme Court of the United States were as follows (p. 439):

"1. Does the recital in the series of bonds issued in payment of subscription to the Evansville, Henderson and Nashville Railroad Company, that they were issued in 'pursuance of an Act of the Legislature of the State of Indiana and ordinances of the City Council of said city, passed in pursuance thereof,' put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued?

"2. Does the recital in the series of bonds issued to the Evansville, Carmi and Paducah Railroad Company, that they were issued 'by virtue of a resolution of said City Council passed May 23, 1870,' put a purchaser upon inquiry as to the terms of that resolution, and charge him with knowledge of its terms?

"3. Do the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company, as against a *bona fide* purchaser for value of such bonds, estop the City of Evansville from asserting that such bonds were not issued, for stock subscribed, upon a petition of two-thirds of the resident freeholders of the city, distinctly setting forth the company in which stock was to be taken, and the number and amount of shares to be subscribed?

"4. Under the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company was a *bona fide* purchaser for value put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of Evansville, freeholders of that city, had been presented to the Common Council, before

that body had subscribed for stock in the said railroad company?

"5. Was a *bona fide* purchaser for value of the bonds issued to the Evansville, Carmi and Paducah Railroad Company charged by the recitals in said bonds with notice that they were issued in pursuance of an invalid act, and in pursuance of an election under it, or had such a purchaser a right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the Common Council before the issuance of such bonds?"

Copies of the bonds containing the recitals referred to are given at pages 435–437 of the opinion of the Supreme Court.

In giving its opinion the Court says (p. 446):

"The Court answers the first, second and fourth questions in the negative, and the third in the affirmative. Its answer is in the negative to the first clause, and in the affirmative to the second clause, of the fifth question."

In giving its opinion in the *Evansville case* the Court also says (p. 443):

"As, therefore, the recitals in the bonds import compliance with the city's charter, purchasers for value, having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the City Council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the Legislature."

This decision of the Supreme Court of the United States, made upon great deliberation, and overruling prior decisions of the Circuit Court of Appeals of the Seventh Circuit, shows that the Supreme Court stands by its prior decisions, and it completely negatives the

position taken by the defendant county and upheld by the Circuit Court—to wit, that the plaintiff, as the *bona fide* holder of the coupons in question, is charged with constructive knowledge of the "financial statements" spread upon the records of the county, contradicting or claimed to contradict the specific recital in the bonds.

Note that the recitals in the bonds in the case of *Evansville vs. Dennett*, that they were issued "in pursuance of an act of the Legislature of the State of Indiana and ordinances of the City Council of the said city passed in pursuance thereof," were very much weaker than the recitals in the bonds now in question; and yet the Court had no hesitation in arriving at the conclusion that the *bona fide* holder was protected by even those recitals in the bonds, and was not bound to consult the ordinances and records of the City Council, even though these were specifically mentioned by date in the bonds.

We say, therefore, that that part of the act of March 24, 1877, which provides for the making of certain financial statements and entering them of record, merely makes them part of the general records of the county. and on authority of the case of *Evansville vs. Dennett, supra*, the *bona fide* holder of municipal bonds which contain certain recitals, such as are contained in the bonds in question in the present case is not obliged to consult the records of the county, nor does he have constructive notice of such records or of any financial statements entered therein.

No record is constructive notice as to any negotiable paper unless a statute expressly so provides.

The proposition that these financial statements are constructive notice to every holder of bonds as against the contrary specific and positive recitals in such bonds, and that they are constructive notice in the absence of any statute which so provides, recital or no recital, seems to us to be an alarming and revolutionary principle in regard to negotiable instruments for the payment of money. The general principle, we take it, is well settled that, in order to render a thing constructive notice, some statute must so provide. This is the principle laid down by this court in the case of *Burck vs. Taylor*, 152 U. S., 634, 654 :

"If notice was essential to charge them, actual notice should have been given, at least in the absence of any statute providing some means for constructive notice."

The principles and rules as to constructive notice have had an extensive application in regard to conveyances of real estate in this country. The statutes of most, if not all of the States, expressly provide for a public office, known as the registry of deeds, where conveyances of real estate may be recorded. Such office is provided with books and indexes and is open to the public at all times, and any person interested may go and examine such books ; and these statutes *in all cases* further expressly provide that the record of an instrument, duly executed and duly acknowledged, shall be constructive notice of such instrument to all subsequent purchasers of the real estate affected thereby.

The opening of this public office and the recording of these deeds without such provision that the deeds so recorded shall be constructive notice has no effect as giving constructive notice to any one. This is evident from the numerous decisions of the courts to the effect that where a deed is improperly recorded (as, for example, where it has been improperly acknowledged), the record of it in the public records is not constructive notice to a subsequent purchaser. Why? Because in the absence of a statute which expressly so provides such record is not constructive notice.

In 20 American and English Encyclopædia of Law, page 600, summarizing the established rule of law, it is said:

"If an instrument is either not authorized by law to be recorded, or is not authorized to be recorded by reason of its defective execution or the failure to comply with the prerequisites to recordation, its enrollment on the records is of no effect, and it cannot be said that it will charge with constructive notice."

In *McEwen vs. Den*, 24 How., 242, the Court said (p. 244):

"The deed offered in evidence was recorded without legal proof of its execution, and, therefore, a copy of the record could not be evidence. The Court erred in admitting the copy to go to the jury."

In *Olcott vs. Bynum*, 17 Wall., 44, the Court said (p. 59):

"The original deed from Hovey to Olcott and Stephenson never having been registered, *and the registration of the copy being unauthoriled*, it follows that the certified copy of the registered copy was a nullity, and could give no legal right to the grantees which the Circuit Court could recognize."

In *Buel vs Irwin*, 24 Mich., 145, the Court said:

"Apart from the curative act of 1861, this certificate was plainly insufficient to authorize the deed to be recorded. To entitle a deed to registry, its execution by the grantor must be proved or acknowledged, and when acknowledged the evidence of the acknowledgment of execution by the grantor must appear by the certificate, and if the acknowledgment is taken abroad, before a Michigan Commissioner, his certificate must be authenticated by his seal. In this case, the certificate does not show that the grantor acknowledged that *he* executed the deed, and, hence, if otherwise regular, the certificate would be bad, and the proof of execution of the deed, required by the statutes as a prerequisite to registry, would be wanting (*Haden vs. Westcott*, 11 Conn., 129)."

In *Ely vs. Wilcox*, 20 Wis., 523, the Court held that, for want of a certificate of a Clerk that the notary taking the acknowledgment was such, and that his signature was genuine, the deed was not authorized to be recorded, and was, therefore, not notice to any one. Other decisions are cited in a note to this case in 91 Amer. Dec., 436.

Mr. Wade says: "The requirements of the statute, both in regard to the official character of the acknowledging officer and the contents of his certificate, must be complied with in every substantial particular, or the record of the instrument will be inoperative as constructive notice."

Wade on Notice, 2d Ed., Sec. 124.

In *St. John vs. Conger*, 40 Ill., 535, the Court said:

"It is insisted that the record of the copy of the deed from Madison County was sufficient to put subsequent purchasers upon inquiry. *To hold that parties ought to have been put upon inquiry by this record would be precisely the same thing as holding them affected with notice.* This would be giving to the record of an instrument, not entitled to be recorded, the same force as to notice that we give to one legally reduced to record. We do not think any

authority can be found in support of this proposition. On the contrary, the familiar rule, and one laid down by this Court, is that the record of an instrument not entitled by law to be recorded is of no avail as notice *(Moore vs. Hunter*, 1 Gilm., 317*)*. It is said that a purchaser, as a matter of fact, receives the same information from the record of a copy as from the record of an original instrument. That may be true. But the broad difference is this : The statute only authorizes the record of original instruments, and it makes that record conclusive evidence of notice. It matters not that a subsequent purchser has not, as a matter of fact, seen the record. If the instrument has been legally recorded, the law presumes him to have seen it, and holds him to the consequences of such knowledge. Not so as to the registry of a copy. It may be that if a party can be clearly proven to have read the record, he should be held to have derived from it the same degree of actual knowledge that he would have derived from seeing a copy of an instrument in the hands of a private individual. He might be considered as put upon inquiry. But the law does not presume him to have read the record of an instrument not authorized to be recorded. In the case before us there is no evidence that the defendant, and the intermediate parties through whom he claims from the heirs of McNemony, had actual knowledge of the record of the copy or had ever seen such record."

It is true that ordinarily the purchaser of a piece of *real estate* must take notice of any judgment and litigation in the courts of general jurisdiction affecting the title to such real estate. But real estate is property, not negotiable according to the law merchant, and an entirely and wholly different rule prevails with regard to judgments or litigation affecting negotiable instruments.

The purchaser of negotiable paper is not bound to take notice (that is, does not have constructive notice) of any litigation pending, or any judgments which may have been previously rendered regarding such negotiable paper.

This principle has been repeatedly decided by this court and other courts.

That a pending suit, or a judgment in any suit regarding negotiable bonds, is not constructive notice to a *bona fide* purchaser thereof was well settled by this court upon great consideration in the case of *County of Warren vs. Marcy*, 97 U. S., 96. This court states as follows the question there presented (p. 105):

"This brings us to the second question; namely, whether the pendency of the chancery suit for vacating the proceedings of the supervisors, and preventing the issue of the bonds in this case, was in itself constructive notice to all persons of their invalidity, or of the objections raised against them. This question has an important bearing upon the case, for, whilst the bonds may be valid in the hands of a *bona fide* purchaser before maturity, and without notice of any defect or vice in their origin, this cannot be said in reference to one who has such notice, or who is chargeable therewith."

The court, after full consideration of the matter and review of the numerous authorities, answered that question in the negative.

So, also, this court, in the case of *Carroll County vs. Smith*, 111 U. S., 556, said (p. 562):

"The defendant in error was no party to that suit, and the record of the judgment is therefore no eostppel.

The bonds were negotiable, and there was, therefore, no constructive notice of any fraud or illegality by virtue of the doctrine of *lis pendens (County of Warren vs. Marcy*, 97 U. S., 96*)*."

See, also, to the same effect:

Orleans vs. Platt, 99 U. S., 676.
Cass County vs. Gillett, 100 U. S., 585.
Thompson vs. Perrine, 103 U. S., 806.
1 Dillon Munic. Corp., 4th Ed., Sec. 514, and cases cited in State as well as Federal courts.

There is also another principle which is especially pertinent to the present case.

Where it is sought to affect the bona fide purchaser for value of commercial paper with constructive notice, the question is not whether he had the means of obtaining or might have obtained by prudent caution the knowledge in question, but whether not obtaining was an act of gross or culpable negligence.

On this subject we refer to the decision of this Court in the case of *Wilson vs. Wall*, 6 Wall., 83, where this Court approved the well-known judgment of Lord Chancellor CRANWORTH in *Ware vs. Lord Egmont.*

This doctrine applies especially to cases of negotiable paper *(Goetz vs. Bank of Kansas City*, 119 U. S., 551, 560*)*.

Applying this principle to the present case, it is perfectly obvious that a person purchasing one of the

bonds now in question, with its specific and positive recital "that the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado," is not guilty of gross or culpable negligence, or of any negligence whatever, in not looking up all of the records of Gunnison County before purchasing the bonds.

The character of municipal bonds as negotiable securities has been well settled by scores of decisions in this Court and many other Courts. As such negotiable securities, easily marketable, passing from hand to hand, they constitute a desirable and convenient investment for money. The importance of preserving to its fullest extent the negotiable character and standing of such securities is fully as great to the municipalities themselves as to the purchasers of such securities. It is their negotiability that is the chief element of their desirability as an investment, and that has resulted in the reduction of the interest on these securities to the present low rates. But once let it be understood among the investing community, who constitute the market for these municipal bonds, that such securities are not negotiable, but that a purchaser of them —it may be in the City of New York, or Boston, or Philadelphia, or Washington, or Chicago—must himself take a journey to Gunnison County, Colorado, and search out records that existed five, ten, twenty or even thirty years before his contemplated purchase of bonds, and inform himself in regard to all those records before he completes his purchase—we say, once let this be understood, and the market for municipal securities is gone. We do not believe that this Court will give its assent to any such doctrine, or that it is going to hold that financial statements recorded in Gunnison

County in the years 1881 and 1882, in the absence of any statute prescribing that they shall be constructive notice, shall, as against a *bona fide* holder of the bonds of Gunnison County which contain the specific and positive recitals that "the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado," constitute constructive notice to each and every purchaser of such issue of bonds, whenever and wherever the same are purchased no matter how many years after they are issued.

One of the practical objections to any holding that these so-called financial statements were constructive notice to the purchasers of negotiable municipal bonds, and the difficulty of determining just how and when such financial statements become constructive notice to the purchaser, are well illustrated by the colloquy between the trial court and the counsel in the present case (Record, p. 67) :

"Counsel for complainants moved to exclude *(the)* these semi-annual statements on the ground that it has not been shown that they were ever published as required by law.

"THE COURT : By published, you mean put in the newspaper ?

"MR. JOHNSON : The statute, which I presume your honor is familiar with, requires that the board of county commissioners shall make this semi-annual statement and publish it in a newspaper if one be published in the county, and if not, that it shall be posted up at three public places in the county, one being on the court-house door ; and in addition to such publication it shall be recorded in a book kept for that purpose only ; we contend that a purchaser would be entitled to take a county paper of the proper date, examine it and ascertain that no such semi-annual statement had been published, and if he knew of this statute, upon ascertaining that it had not been published, and finally ascertaining that it had not been posted, he would have a right to assume that it was not recorded;

and indeed the wording of the statute would seem to contemplate a record that had been first published and then made a record afterwards.

"MR. THOMAS: It is true, as counsel states, that we have made no attempt to show the publication of these statements; we were able to obtain some evidence of an unsatisfactory character upon that subject, but nothing that was of sufficient importance and weight to justify us in attempting to offer it, as the publication of newspapers at that time was not in a very satisfactory condition in that county; the papers would be published for a few months and then disappear, or would be merged into some other paper, and it is impossible for us to find any of the old files of any of the papers, and they do not seem to have been preserved by the clerk and recorder, and we take it that under the statute it is the record of the statement that is notice, and not the publications in the papers that is notice to the purchaser.

"THE COURT: I think we will have to allow this evidence to stand. I do not regard the publication as of any weight.

"To which ruling of the court counsel for plaintiffs then and there duly excepted."

These remarks were made in view of the discussion which took place in the trial of the cause as to what it is that makes the constructive notice to the bond purchaser. The statute prescribes that these financial statements shall be published in a newspaper, or posted, and recorded in a book. The statute does not itself prescribe that any of these things shall be constructive notice to the purchaser. No wonder, then, that the counsel and the court on the trial of the cause may have been a little perplexed as to determining which one of the things it was that made the constructive notice. The truth of the matter is that none of them did. The difficulty of deciding as to exactly what it is that gives the constructive notice well illustrates the mischief of holding that any of the things gives or can give constructive notice (in the absence

of an express provision in the statute making anything constructive notice) to a *bona fide* purchaser of the bonds, who has bought them, perhaps, ten, twenty, thirty, or even forty years after they were issued and after such financial statements were made.

With all due respect to the opinion of this court in the case of Sutliff vs. County of Lake, 147 U. S., 230, we respectfully submit that section 30 of the act of March 24, 1877, which provides that the county officers shall make semi-annual statements, did not expressly or impliedly provide that such semi-annual statements should have any connection, and they do not have any connection whatever with the issuing of any county bonds.

In considering the force, effect and legal value of the *Sutliff case*, it is to be borne in mind that the record of the case was not before the Supreme Court. The case came before it on two general questions, almost in the nature of moot questions, certified to it by the Circuit Court of Appeals, and the opinion given consisted only in answering those questions. The opinion in that case giving those answers was as general as the questions, and was, so far as appears, unanimously concurred in by the court. It is obvious from the opinion that the court did not consider that it was laying down any new principle or overruling principles and rules which it had many times decided, which are, nevertheless, overruled if the view taken of that case by the learned counsel on the other side is correct.

One would naturally infer from reading the opinion in the *Sutliff County case* that the said act of March 24, 1877, was an act which had for its sole object, or,

at least, for its principal object, the issue of bonds, and that the semi-annual statements being required were, therefore, to be inspected by the bondholder because they were part of the execution of the legislative power under the Statute for the issue of the bonds. The facts with regard to this act of March 24, 1877, we submit, do not sustain any such view. In the first place, the act of March 24, 1877, was the General County Act. It will be recollected that Colorado was admitted as a State in 1876. At the session of the legislature in 1877, the legislature passed an act making a Compilation of county laws, the same being an act entitled "An act concerning counties, county officers and county government, and repealing laws on these subjects," approved March 24, 1877 (General Laws of Colorado, 1877, pp. 218-252).

The title page of these General Laws states that they comprise

"that portion of the Revised Statutes of Colorado and the general acts of the subsequent legislative assemblies of Colorado territory for the years 1870, 1872, 1874, 1876, still remaining in force, and the general laws enacted at the first session of the general assembly of the State of Colorado convened November 1, 1876."

We proceed to make an analysis of the act of March 24, 1877, for the purpose of showing that it did not expressly or impliedly provide that the semi-annual statements prescribed to be made by section 30 should have any connection, and that they do not have any connection whatever with the issuing of any county bonds.

This act contains 143 sections, and it deals with county matters generally. Section 1, for example, pro-

vides that each county shall be "a body corporate and politic, with power to sue and be sued," &c., the first nineteen sections of the act being concerned with the usual general powers of the county, and the county officers, meetings of county commissioners, &c. Then come Sections 20 to 25, which, as stated by the United States Circuit Court of Appeals in this *Lake County case*, contained all the provisions of the said act relative to the issuing of bonds for the purpose for which the present bonds were issued—namely, for county buildings. Then follow Sections 26 to 29, which provide for the issuing of bonds in exchange for county orders. These Sections were probably repealed by the act of February 21, 1881 (Session Laws, 1881, p. 85), entitled "An act to enable the several counties of the State to fund their floating indebtedness," which repeals all acts or parts of acts in conflict therewith. Then follows Section 30, which provides as follows:

"SEC. 30. It shall be the duty of the Board of County Commissioners of each county to make out semi-annual statements at the regular sessions in January and July, at which times they shall have such statement published in some weekly newspaper published in the county, if there be such published; and, if there be no newspaper published in the county, such Commissioners shall cause such statements to be posted in three conspicuous places in said county, one of which shall be the Court House door; and such statement shall show the amount of debt owing by their county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall be shown from what officer and on what account any money has been received, and the amounts, and to what individuals and on what account any money has been paid, and the amounts; and shall strike the balance, showing the amount, deficit, if any, and the balance in the treasury, if any, and the statement thus made, in addi-

tion to being published as before specified, shall also be entered of record by the Clerk of the Board of County Commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times."

Section 31 provides for the organization of precincts; section 32, for the seal of the board of commissioners; section 35, how claims against the county are allowed; section 36, how county orders are to be signed; section 37, appeal from the decision of the broad of commissioners on allowance of claim against the county; section 38, duties of the county clerk in case of appeal; section 39, books, blanks, stationery, &c., for the use of the county, &c.; section 40, examination of county orders and record of same, &c., down to section 47, regulating in detail the method of transacting county business, and keeping the county records and accounts. Certain sections in the act—48 to 50—relate to the county judge. Sections 51 to 61 relate to the county clerk. Sections 62 to 79, to the county sheriff. Sections 80 to 98, to the coroner; sections 99 to 115, the county treasurer; sections 116 to 120, the county surveyor; sections 121 to 123, the county assessor; sections 124 to 126, justices of the peace and constables; sections 127 to 143, miscellaneous provisions.

We have given this brief analysis of the act of March 24, 1877, and have quoted the said Section 30 for the purpose of showing that there is not a word or syllable in the said Section 30 which has any reference to or any necessary connection with the issue of bonds of the county. The said Section 30 provides that these semi-annual statements shall be made out at the regular sessions in January and July, and provides for the

publishing of these statements in newspapers or posting in the county. The obvious purpose of this is to inform the people of the county of county affairs. That it has no connection with a bond issue, and that it does not intend to inform the bond purchaser, is obvious from a moment's reflection. It is provided that these statements shall be made *at the regular sessions in January and July*, and the statement of the debt is to be made up at that time as of that date; *whereas a bond issue might be made at any other time during the year*, and these debt statements thus made in January and July would not show or purport to show indebtedness at the time of the issue of the bonds. Is it conceivable that, if this section 30 was intended to have or does have any direct connection with a bond issue, such as to make it necessary that the bond purchaser should examine such statements, it would not have provided that the county commissioners should make a statement of the indebtedness at the time of the issue of the bonds, and should file such statement, and that the bond purchaser should be bound to examine the same? Is it conceivable that the statute would have provided for statements in January and July, and that these should be taken as notice to the bondholder of the indebtedness which existed, not at those times, but at the time of the issue of his bonds at some other time of the year?

The true explanation of the said section 30 is that this is merely a section that marks out the administrative duty of the county officers as to keeping the records of the county, and that the same shall be published or posted for the information of the inhabitants

thereof. The periods at which they are made, and the fact that the section contains no reference whatever to any bond issue, show that the section was not intended to have, and does not have, any direct connection with a bond issue.

Similar provisions exist in the General Statutes of other States, and it has, we believe, never been determined that these statements have any other effect than to make such semi-annual statements a part of the ordinary records and accounts of the county, and give to them only the usual effect of such records and accounts. In other words, there is nothing extraordinary or unusual in section 30 of this compilation of the county laws of Colorado. There is no basis or warrant for the argument that this is to be treated in any other respect than as the ordinary records of the county.

For example, the General Statutes of Iowa, so long ago as 1860 (Revision of 1860, p. 51), carrying forward a provision to the same effect in previous acts, provided that the county board of supervisors, after each regular or special meeting, should publish in at least one newspaper, if there be one, if not, by posting on the court house door, a schedule of the receipts and expenditures of the county, which shall state the names of the claimants, the amount claimed, the amount allowed, for what purpose allowed, and a full statement of the amounts of the treasurer's accounts at the last settlement as on his balance sheet, &c.—all this obviously for the information of the taxpayers and citizens of the county.

Other States have in their General Statutes regarding counties similar provisions requiring county offi-

cers at stated periods to make, record and publish statements of the indebtedness of the county, &c., &c. We have not attempted to make any exhaustive search to find such statutes; but we have taken at random the statutes of a few States which we happened first to examine.

KANSAS.

"SEC. 33. *County orders.*—The board of county commissioners, at their July session of each year, or oftener if they deem it necessary, shall carefully examine the county orders returned by the county treasurer, by comparing each order with the record of orders in the clerk's office. They shall cause to be entered on said record opposite to the entry of each order issued the date when the same was canceled. They shall also make a list of the orders so canceled, specifying the number, date, amount and the person to whom the same was payable, and enter the same on the journal of the board.

"SEC. 34. *Receipts and expenditures.*—The boards of commissioners of their respective counties shall cause to be made out and published, yearly, in at least one newspaper in their county, if such there be, a report of receipts and expenditures of the year next preceding, and the amounts allowed, and *a detailed statement of the indebtedness of the county*, at the end of each year; but, if there be no newspaper printed in said county, their said statement shall be posted in at least five public places in said county.

"SEC. 35. *Statement of sums allowed.*—The board of county commissioners shall cause to be publised a statement, at the close of every regular or special meeting, of all sums of money allowed, and for what purpose; said statement to be published once in some paper of general circulation in the county. They shall also publish a statement of the estimate of expenditures for the various purposes upon which they based their levy of a tax for the various purposes of revenue" *(Compiled Laws of Kansas, 1885, pp. 267, 268).*

MISSOURI.

"SEC. 3187. *Court to make out account of receipts and expenditures, etc.*—And the said courts shall, at the same time make out *a statement of the amount of debt due by their counties* and a detailed account of the receipts and expenditures of the same for the preceding year, showing from what officer and on what account any money has been received, and to what individuals and on what account any money has been paid, and shall strike the balance, showing a deficit, if any, or the balance in the treasury, if any (R. S., 1879, sec. 5390).

"SEC. 3188. *Statement to be recorded and published.*—The facts thus ascertained, and the accounts and statements thus made out, shall be entered of record in the said courts and published in some newspaper in each county where any such may be printed; and if there be no newspaper published in the county, then copies of the same shall be put up in the most conspicuous place in each township of the county, by the sheriff, within three weeks after the adjournment of the term at which the proceedings above mentioned shall have been had" (R. S., 1879, sec. 5391; *Revised Statutes of Missouri, 1889, Vol. I., pp. 804, 805*).

NEBRASKA.

"SEC. 25. [*Duties of the Board:*] It shall be the duty of the county board of each county: * * *

"SIXTH. [*Estimate of expenses:*] At their regular meeting in January of each year, to prepare an estimate of the necessary expenses of the county during the ensuing year, the total of which shall in no instance exceed the amount of taxes authorized by law to be levied during that year, *including the amounts necessary to meet outstanding indebtedness as evidenced by bonds, coupons or warrants legally issued;* and such estimate containing the items constituting the amounts shall be entered at large upon their records and published four successive weeks before the levy for that year, in some newspaper published and of general circulation in the county, or, if none is published, then in some newspaper of general circulation therein, and

no levy of taxes shall be made for any other purpose or amounts than are specified in such estimate as published, but any item or amount may be stricken from such estimate, or reduced, at the time the levy is made. If any levy shall be made in excess of such estimate, the tax shall not therefore be void, but the members of the county board and their sureties shall be jointly and severally liable upon their official bonds for the full amount of such excess, which shall be collected by civil action as in other cases, for the use of the school fund of the county. If the members of the said board neglect to comply with any other provisions of this section the tax shall not therefore be void, but they shall be liable to a penalty of five hundred dollars, to be recovered by civil action as in other cases, for the use of the school fund of the county" *(Compiled Statutes of Nebraska, 1889, p. 349).*

Difference between words "assessed valuation" and "indebtedness" as used in the constitution and as respects notice.

It may be that the words "the assessed valuation" as used in the constitution point to a record; namely, the valuation as shown by the assessment books or rolls. But there is nothing like this in the constitution as to the word "indebtedness." No record is referred to in the constitution as to that; and, so far as the constitution is concerned, indebtedness is a matter *in pais*, to be determined according to the ordinary principles of law. There is no reason, therefore, why this matter should not have been determined by the county officers in issuing the bonds and in the recitals therein, for such officers are the authorities recognized by the constitution as well as by the statutes as having charge of the affairs of the county and being authorized to act in its behalf. They have charge

and particular knowledge of the county's affairs which a bond purchaser does not and is not expected to have.

(3). *These "financial statements" do not show, or pretend to show, nor did defendant in connection with them attempt to show, the* ACTUAL DEBT AT THE DATE OF THE DELIVERY OF ANY OF THE BONDS."

These so-called financial statements do not show or purport to show the amount of the indebtedness of the county except at the periods of December 31, 1881, June 30, 1882 and December 31, 1882. They did not show when it originated. They did not show how much was current indebtedness payable out of existing tax levies. The bonds in question in this suit were dated December 1, 1882 (Record, pp. 3, 77) and were delivered from time to time from 1882 to 1884. These statements, therefore, do not show the indebtedness on the date of the bonds in question or on the date when they were delivered; and for this reason are inadmissible as evidence.

It was proved that the bonds in question were issued and delivered from time to time, beginning December 1, 1882, down to and including the year 1884 (Rec., pp. 51–53). The defendants did not prove the actual dates when the bonds were issued, nor did they prove the indebtedness of the county on those dates. In fact, they did not prove, or attempt to prove, what amount of indebtedness actually existed on the date when the bonds now in suit were actually delivered.

Indeed, so far as these financial statements are concerned, we maintain that they are not admissible against *any* holder of the bonds, whether he be a *bona fide* holder or not; for they do not tend to show any defense against the bonds in anybody's hands, for they do not

show the amount of the debt of the county when the bond debt was incurred.

The views of the Circuit Court of Appeals on this subject and in respect to the "great fluctuations of the debt between the several semi-annual statements," &c., are, we submit, both forcible and sound (Record, p. 183).

(4) These financial statements do not show or pretend to show WHEN THE INDEBTEDNESS WAS INCURRED *which was represented by the warrants, and which was finally funded into funding bonds. For all that these statements show, such indebtedness may have been incurred prior to the adoption of the constitution, or prior to September 1, 1881, when Gunnison County first attained an assessed valuation of $1,000,000, and up to which time, therefore, the debt-limit clause had no application to that county. The bonds in question in this case recite that they "are issued in exchange at par for* VALID *floating indebtedness of the said county."*

If it be true that the question of debt under the debt limit prescribed by the constitution of the State of Colorado is a matter which cannot be the subject of a recital in the bonds so as to estop a county, but is open to the county to prove in any case in defense of its bonds, then the county has not in the present instance made out its defense, for it has introduced no evidence competent to prove that fact.

The act of March 24, 1877, in providing for the making of these financial statements and entering them in a book to be kept by the county clerk, did not provide that such statements should have any effect whatever as evidence. The object of that statute was not to charge investors in the county's authorized funding bonds with constructive notice, but for the general

information of the citizens and taxpayers of the county. We submit, therefore, that the act of February 21, 1881, is the ENTIRE CODE OF POWER AND REGULATIONS as to the issue of funding bonds to fund floating indebtedness. The statute, even if it has any application to funding bonds issued under the act of February, 21, 1881, did not make the statements *prima facie* evidence, nor any evidence whatever; much less did it make the statements conclusive evidence that such indebtedness existed, which was the effect given to these statements by the Circuit Court in the trial of this case (Rec., p. 72).

The facts that such warrant indebtedness existed, and that the warrants representing such indebtedness were issued after the county attained an assessed valuation of $1,000,000, and that the total amount of such warrant indebtedness exceeded the amount of $1.50, or $3, or $6, or $12 on the $1,000, do not constitute *prima facie* evidence that the indebtedness is incurred in excess of the limit prescribed by the constitution.

This precise proposition has been decided by the Supreme Court of Colorado in the case of *Lake County vs. Standley*, 49 Pac. Rep., 23 (January 18, 1897), referred to more at length *(infra*, p. 104*)*. That case decided that all these facts put together do not even make a presumption that the warrant indebtedness is invalid, but that, if the matter can be gone into at all, the burden is upon the county to show when the indebtedness itself was incurred; and that there is no presumption that such indebtedness was incurred at the date of the issuing of the warrants. We say that this matter cannot be gone into at all as against a *bona*

fide holder, much less against the holder of bonds containing specific recitals like the present ones.

(5) There is no valid proof in this case that the BOARD OF COUNTY COMMISSIONERS *ever made out any of these semi-annual statements.*

These statements are signed by the Commissioners, but their act as individuals is not the act of the Board. The statute requires the *Board*, as such, at its regular sessions in January and July, to make out these statements. The official action of the Board can only be established by the record. No record was introduced. The statements are all tested by the County Clerk, but only one of them has any date upon it. The one for December 31, 1882, is dated as of January 1, 1883. The regular session of the Board was on the first Monday in January (General Statutes 1877, p. 220, Section 439). As the first day of January was a legal holiday, the Board could not be in session. These statements appear on their face to be mere compilations from the books of the County Clerk and Treasurer. They could be made out at one time as well as another; *i. e.*, the data was probably in the account books of the county, as counties generally keep account books from which such matters could be compiled. They are all in precisely the same form.

The statement for the six months ending June 30, 1882, is the only one that would have any bearing on this issue of bonds. Was this made out by the Board? Was it made out at the July session? Was it made out and recorded prior to the 1st day of December, 1882, the day on which the bonds were issued, or prior to the time when the bonds were delivered? There is not a *scintilla* of evidence on which any one of these interrogatories can be answered in the

affirmative. The certificate of the Clerk, the present custodian of the book in which the statement is recorded, is to the effect that it is a full, true and correct copy as the same appears of record in book of statements, but neither the certificate nor the statement itself shows when it was made out or recorded, or that it was ever made out by the *Board.* Indeed, the statement on its face shows that it was made by the Commissioners, merely as Commissioners, and not as a Board *in regular session.* This is a matter of *vital importance.* A person who was contemplating a purchase of these bonds, and knowing of the law requiring this statement to be made out by the Board, at its regular session in July, would have the right to examine or get some one to examine the record of the proceedings of the Board at that session, and, if that record did not show that the Board had taken action in accordance with the statute, he would be entitled to act upon the theory that no such statement had been made, published or recorded. The *making out* by the *Board,* in its capacity as a Board, is the first step towards a valid record. In the absence of this, there can be no valid record. The question does not necessarily arise as to *how* it could be proved that this statement was made out by the Board. There was no attempt to prove it, either by any record or by parol, and, as we have seen (Record, pp. 108-120), the statement on its face appears to have been made by the persons signing it, as Commissioners, *and not as a Board.* The action of a Board expressly required to be taken at a regular session can be proved only by the record proper of the Board.

County Commissioners vs. Hamlin, 31 Kan., 105.

Bridges vs. Supervisors of Clay County, 58 Miss., 817.
Crump vs. Supervisors, 52 Miss., 107.

In *Bridges vs. Supervisors of Clay County, supra*, the Court said :

"Boards of Supervisors bind counties only when acting within the range of their authority, and in the mode and manner *pointed out by the statutes.* Their contracts are evidenced by *the entries on their minutes*, and can no more be varied by proof that the members failed to speak, though they knew that those with whom they were dealing misunderstood the purport of what they were doing, than they can be created and established by silence alone. It takes an affirmative act of the Board within the scope of its authority, *evidenced by an entry on its minutes*, to bind the county by a contract, and, when thus made, the contract is not to be varied, any more than created, by the silence of any portion of the Board and the mistaken assertions of others."

The general principle is that a Board can only speak by its record, and, before it can be said that the Board has done any act that must be done by express requirement at a session thereof, the minutes of the Board, and those only, are the proper proof.

6. *These statements were* NEVER PUBLISHED *as the law requires, and, without such publication, they could not be legally recorded (Colorado State Bank vs. Davidson*, 7 Colo. App., 91 ; Wade on Notice, Sec. 119*)*. The statute provides that the statements shall be made out by the Board at their regular sessions in January and July, at which times they shall have such statements published in some weekly newspaper published in the county, if there be such published ; and if there be no newspaper published in the county, such Commissioners shall cause such statements to be

posted in three conspicuous places in said county, one of which shall be the Court House door, and the statements thus made, in addition to being published as before specified, shall also be entered of record by the Clerk of the Board of County Commissioners in a book to be by him kept for *that purpose only*, which book shall be open to the inspection of the public at all times.

If this statute contemplates the recording of a published statement, then the recording of one not published would give no notice *(Colorado State Bank vs. Davidson*, 7 Colo. App., 91*)*.

This semi-annual statement is an instrument unknown to the common law. It is made, published and recorded by virtue only of this statute. Being in derogation of the common law, it should be strictly construed and closely pursued *(Crane vs. Chandler*, 5 Colo., 21 ; Wade on Notice, Sec. 1122*)*. If the purpose was to give constructive notice of the indebtedness of the county, then a literal compliance with the statute should be required. The statute requires the statement to be made and published at a *certain time*. Why ? Clearly this was done to enable people interested in the matter or dealing with the county to know when they could look for the publication. It requires the publication to be made in a weekly newspaper published in the county. Why was this ? Clearly to enable a person to know just what paper to inquire or send for. It requires, in the event there is no such paper published in the county, that the Commissioners shall cause such statement to be posted in three conspicuous places in the county, one of which shall be the Court House door. Why was this requirement made ? Plainly the Legislature contem-

plated that an effort should be made to bring home, as far as possible, to the people of the county actual notice of the facts required to be set forth in this statement. The publication or posting was a part of the execution of the statement. It takes the place, by analogy, and as far as possible, of delivery of the instrument to those to be affected thereby. What would be the practical business course of a person dealing with the county with knowledge of this statute? He would, at the time fixed by the statute, inquire for and obtain a copy of the weekly newspapers published in the county, or, if there was no such paper published in the county, would look or inquire for the posting on the Court House door. Not finding that the statement had been published or posted he would naturally and justly conclude that it had not been made.

(7.) There is not only no evidence that the statement was ever made by the Board or that the same—such as it was—was recorded before these bonds were issued, but there was no legal evidence that it was ever recorded IN A BOOK KEPT FOR THAT PURPOSE ONLY.

Certified copies of these statements were not the best evidince. The original record was the best evidence, but beyond this these certified copies had no tendency to establish the nature of the book from which they were taken. One of the issues was as to whether these statements had been recorded in a book kept for that purpose only. This could only be determined by some title, label, heading and the general contents of the book. The best evidence of this was the book itself. In *Granley vs. Jermyn*, 163 Pa. St., 501, the Court held that the best evidence of the heading of a hotel register is the register itself. In *Roden*

vs. Brown, 15 So. Rep., 598, the Court held that a bank officer cannot testify as to the contents of the books of the bank without producing them. In *Thomas, Kane & Co. vs. School District of Calhoun*, 48 Mo. App., 408, the Court held that the record of a Board of School Trustees is the only proper evidence of their proceedings. In *State vs. Central Pacific Railroad Co.*, 17 Nev., 259, the Court held that the proceedings of a County Board must be shown by the record. To the same effect is *Yavapai County vs. O'Neil*, 29 Pac. Rep., 430). This book was in possession of defendant and no reason for not producing it other than a desire to conceal it can be imagined (1 Greenleaf on Evidence, Sec. 82). The modification of the rule as to public books and documents (*Id.*, Sec. 91) does not reach the question here. *The question here is as to whether a book was kept of a certain description. This question cannot be answered by a copy of a certain document contained in it.* Nothing short of an inspection will determine the character of the book. The question, then, is as to whether the book shall be produced and let speak for itself or whether both sides shall be required to bring witnesses before the Court who have examined the same to testify relative to those distinguishing characteristics which would determine whether this was a book answering the requirement of this statute. We submit that the Court committed error in allowing parol evidence of the nature and contents of this book. We further submit that the parol evidence was not such in regard to the nature of this book as to warrant taking the case from the jury upon this question.

(8) These semi-annual statements, even if made, pub-

lished and recorded according to law, would not enable a purchaser of these bonds TO FORM ANY CORRECT OPINION IN REGARD TO THE VALIDITY *of the floating indebtedness that was being funded.*

See on this point the case *Lake County vs. Standley*, 49 Pac., Rep. 23, *infra*, p. 104.

We do not under this proposition question the decision in the *Sutliff case.* Nothing, however, but an abstract principle was there discussed or determined. It was merely determined that a purchaser of bonds, issued under the act containing this provision, would in the absence of a conflicting recital be required to take notice of a record made in accordance therewith. It was perhaps *assumed*, but certainly not *adjudicated*, that such record would enable the purchaser to determine whether the bonds were or were not issued within the limitation of the Constitution, but, if so, this was (as shown above *ante*, p. 88) a mistaken assumption.

It is a principle of universal application that a record cannot give constructive notice of anything beyond the facts which the law requires the record to contain, and, for the same reason, he cannot be charged with notice of anything beyond what the record actually contains (20 American and English Encyclopædia of Law, page 599).

The statute requires this statement to show the amount of debt owing by the county, in what the debt consists, etc. It does not require that it shall show *when* the debt was contracted, or whether, when contracted, it was within the constitutional limitation or not. As we have seen, the question as to whether any part of the floating indebtedness that was funded by the issuance of these bonds was incurred in excess of

the constitutional limitation, would depend upon how much of it was incurred prior to the equalization of 1881, for, prior to that, there was no limitation upon the amount of debt that could be contracted. This statute does not require any record to be made, an examination of which would determine that fact.

Even if it were to be assumed and held that a purchaser of negotiable bonds without any recitals would have constructive notice of the so-called financial statements, and would be bound at his peril to examine such statements before purchasing the bonds (and if this were held to be so in the absence of any statute which provides that such financial statements shall be constructive notice—a holding which we believe to be clearly erroneous), yet the recitals in the bonds would in such event constitute an estoppel, precisely on the same principle that an estoppel may and frequently does exist in respect to the title of real estate.

The statutes of most of the States provide for records of deeds and mortgages and other instruments of conveyance of land, and that such records shall be constructive notice to all subsequent purchasers. Nevertheless, the courts uniformly hold that a person may estop himself from relying upon the constructive notice which such records furnish.

This was held in a case in New York in regard to a municipal corporation. *Trustees, &c., of Town of Brookhaven vs. Smith*, 118 N. Y., 6. There the town had

passed certain resolutions recognizing the title of the land in Smith, whereas the records showed that the title was not in Smith, and the Court of Appeals held that the town was estopped to assert or rely upon the record title. The court says (p. 641):

"The authorities in this state are all harmonious on the subject of estoppel *in pais*.

"When a party, either by his declarations or conduct, has induced a third person to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission if the consequence would be to work an injury to such third person or to some one claiming under him (*Wendell vs. Van Rensselaer*, 1 Johns. Ch., 344, 354; *Storrs vs. Barker*, 6 *id.*, 166; *Town vs. Needham*, 3 Paige, 545; *Dezell vs. Odell*, 3 Hill, 215; also see dissenting opinion of Judge BRONSON approved in 47 N. Y., 500; *Brown vs. Sprague*, 5 Denio, 545; *Plumb vs. Cattaraugus C. M. Ins. Co.*, 18 N. Y., 393; *Welland Canal Co. vs. Hathaway*, 8 Wend., 483; *Thompson vs. Blanchard*, 4 N. Y., 303; *Cont'l Nat. Bk. vs. Nat. Bk. Commonwealth*, 50 *id.*, 575; *Armour vs. M. C. R. R. Co.*, 65 *id.*, 111-122; *N. Y. Rubber Co. vs. Rothery*, 107 *id.*, 310-316).

"Numerous cases where this principle has been applied to real estate are collected in Washburn on Real Property (vol. 3, chap. 2, sec. 6), to which reference is made. When so applied it is as effectual as a deed would be from the party estopped.

"The general rule deduced from all the authorities is that if one is induced to purchase land by the acts or representations of another designed to influence his conduct, and creating a reasonable belief on his part under which he acts that he is thereby acquiring a valid title to the same, the party who thus influenced him is estopped from setting up his own title, existing at the time of the purchase, against that of the purchaser.

"The various declarations of the town through the trustees and town meetings must be construed as a single representation. They were all *in pari materia*, and had one purpose—viz., to inform Smith that the town made no claim to the land he desired to purchase."

We, therefore, submit that the admission in evidence

of this semi-annual statement of June 30, 1882, was error, and for a greater reason the statements of December 31, 1881, and December 31, 1882, were inadmissible. The latter was made *after* the bonds were issued and $5,000 of them had passed to Standley.

To hold that the financial statements, warrants, orders of County Commissioners, &c., can be introduced as evidence to overthrow the estoppel produced by the recitals in the bonds is for the County to invoke and use the doctrine of constructive notice to perpetrate a fraud. But Courts never permit this doctrine to be invoked for any such purpose.

This is a principle that will forever stand in the way of any person, whether natural or artificial, retracting such representations as those made in these bonds. The question of fact as to whether the indebtedness which was being renewed by these funding bonds was *valid floating indebtedness was one peculiarly within the knowledge of defendant.* Stanley, who purchased the bonds, had no actual knowledge on the subject. He trusted to and relied upon these representations. The agents of defendants, who made the representations, either *willfully falsified* or recklessly certified to that which they did not know, which was little better. The doctrine of the *Sutliff case*, as applied to any recitals in those bonds, is one thing, but the application of it to overthrow the recitals in these bonds would be another matter. What were these recitals made for? Clearly and certainly, for the purpose of inducing the holders of warrants—then past due, and payment of which was being demanded—to extend the time of payment for twenty

years. They knew, also, that these bonds would go on the market and would pass from hand to hand for value. They knew that these representations would give currency to the bonds. They knew they would reach the hands of such men as Standley, who would place their money in them as an investment. To now allow defendant to allege the falsity of these representations would be to allow it to perpetrate a fraud—an *actual, willful and monstrous fraud.* This has never before been tolerated by a Court of justice. The recital of facts which the Courts have allowed to be disputed have related to facts implied rather than expressed. They were not recitals which, in their nature, were fraudulent, if false. The doctrine of constructive notice can never be invoked as an aid to the perpetration of a willful fraud. It is a doctrine used to balance and adjust equities where no fraud is intended. Suppose a man has a deed on record, but, for the purpose of defrauding a third party, tells him that his grantor has a perfect title, and induces him to buy the property. Will the doctrine of constructive notice aid in the fulfillment of the fraud? Certainly not. But where is there any difference, in principle, between the case supposed and the case at bar? These representations were with reference to definite, specific facts. There is no pretense that a *mistake* was made. They were calculated to *deceive.* A man is presumed to intend the natural results of his acts. They were of such a character that if—as is now claimed—they were absolutely false, they must be pronounced willfully *fraudulent.* Let us see what the Courts have said upon this subject.

In *Converse vs. Blumrich*, 14 Mich., 109, the Court said:

"The laws of constructive notice can never be so applied as to relieve a party from responsibility for *actual misstatements and frauds.*"

In *Groton Savings Bank vs. Batty*, 30 N. J. Eq., 126, the Court said:

"The principle [that the possession of land is notice to others of the possessor's title] which the Lathrops invoke is intended for a shield to protect the equitable rights of those who are entitled to the consideration of equity. It will not be available as a *cover of fraud* nor will it be applied against equity."

In *Wild vs. Gibson*, 1 H. L. Cas., 605, the Court said:

"Constructive notice is resorted to from the necessity of finding a ground of preference between equities otherwise equal, but cannot be applied in support of a charge of *direct personal fraud.*"

See, also, *Gill vs. Hardin*, 48 Ark., 412.

In *Stone vs. Covell*, 29 Mich., 359, the Court said:

"We have heretofore held that a man is bound by his positive and unequivocal assertions of fact, and bound to make good the consequences of their falsehood. And when he asserts as true what he has reason to believe false, and gives no qualification to show that he is not speaking positively and from knowledge, we think there is no sense or justice in exempting him from responsibility (*Converse vs. Blumrich*, 14 Mich., 109; *Beebe vs. Knapp*, 28 Mich., 53; *Beatty vs. Lord Ebury*, L. R., 7 H. of L., 102)."

The principle of constructive notice is always resorted to in order to prevent the person having it from doing an act to the injury of another, and does not apply where the question is whether one was barred by his assent to a *fraud practiced on him* (*Spencer vs. Spencer*, 3 Jones Eq., 404).

The defendant in this case is pleading its *own fraud.* It is asking to be permitted to show that its positive

statements of facts *were false*—not false by mistake, but *willfully false*. It does this upon the flimsy pretext that it had made another record, at another time, and under another law, which, if the purchaser of these bonds had examined, he would have ascertained that this latter statement was false. Even if this conclusion, as to what the former record would show, were correct, we deny that the fraud can be evaded in that way. This former record could only give constructive notice, and that is inadequate to repel a positive fraud.

But we desire again, in the light of this principle, to direct attention to a comparison of the semi-annual statement of June 30, 1882, and the recitals in these bonds. The statement says nothing about *valid* or *invalid* indebtedness, while the recital is that it is *valid*. The statement says nothing about the Constitution, while the recital is that the debt was within its limitations. Back of these recitals was an order entered of record prescribing what the bond should recite. Suppose there was some conflict between these records. Which was a purchaser entitled to believe? The recital was the later record. It was *specific and certain* as to the validity of the debt, while the other was not. It related to a matter not only peculiarly within the knowledge of defendant, but one that it was its *duty* to investigate. The semi-annual statement showed that there was a large floating indebtedness out, and the recitals did not show on their face that any but valid indebtedness was being funded. Indeed, the recitals imported that the Board, in issuing these funding bonds, was carefully discriminating between the valid and invalid indebtedness. The recital, on the face of each bond, that the bond was issued to fund *valid*

floating indebtedness, clearly imported that there were some invalid floating obligations out, but that these were not included in these bonds, and this recital, as to any particular bond, would not be shown to be false by anything appearing in this semi-annual statement. If a purchaser of the earlier bonds must take notice that the Board contemplated issuing further bonds, he would have the right to assume that they would not go beyond the *valid* debt, for all the bonds were to contain this recital. If he would not have the right to make this assumption then, he would occupy the stronger position of being entitled to presume that the Board, in issuing bonds, discriminated between the valid and invalid indebtedness, and inserted this recital only in the bonds that were issued for the valid part.

As to this question of fraud, it will not do to try to make a scapegoat of the Board, and plead the innocence of the people of this county. The people voted these bonds. The procedure of the Board was all entered of record. The whole transaction was open and public. Interest was collected and paid on the bonds for several years. Neither the present Board nor the taxpayers of this county propose to pay that part of the debt which they know is valid. They want to make the issuance of these bonds, containing these false and fraudulent recitals, a means by which they can repudiate all of their valid, as well as their invalid, indebtedness. During the period of over one year that these bonds, containing these recitals, were being issued, no taxpayer came forward and objected to their issuance or to the recitals they contained. They acquiesced in the fraud until they got the full benefit of it.

VII.

The trial court erred in admitting in evidence to contradict the specific and positive recital in the bonds, the list of warrants and memoranda regarding the same.

No particular warrants which were offered in evidence were identified with any of the bonds now here in question. It was not proved when the said indebtedness represented by the said warrants or any of them was incurred. For all that appears the debt may have been incurred before the debt limitation of the constitution had any application to Gunnison County, or the debt may have been incurred long before the date of the warrants. Although the warrants may have been issued in payment of the debt, for all that appears and for all that was shown in connection with the offering of the warrants in evidence, the indebtedness may have been incurred a long time prior to the date of the warrants and to the date of their issue.

The precise point determined in the case of *Lake County vs. Standley*, 49 Pac. Rep., 23 (January 18, 1897), was that a warrant is *prima facie* evidence of a valid indebtedness, and that the burden of proving that it was issued for illegal indebtedness rests upon the county. In that case a rehearing was asked for and granted on the ground then presented by the learned counsel who now represents Gunnison county here before this court, "that *that burden is met by showing that a warrant was issued subsequent to the date when the constitutional limitation had been reached*, since the presumption then attaches that the warrant was

issued for an indebtedness then contracted, and not for an antecedent debt." We have here just quoted the language of the learned counsel for the county as it was stated by the Supreme Court of Colorado showing the precise point that was involved in the rehearing of the said case of *Lake County vs. Standley.* The Court then says (on rehearing June 1, 1897, p. 29):

"That such a presumption cannot be safely indulged is shown by the facts in this case, as it appears that on October 9, 1879, the date of the warrants described, claims were allowed and warrants ordered to issue for an indebtedness that was contracted in May and April preceding. **We think the presumption that the consideration for which a warrant issues is valid obtains until it is shown that such consideration is illegal; and, if illegal because incurred after a certain date, it devolves upon the county to show that fact.** In this view, therefore, it becomes immaterial whether we were technically correct in saying that a major part of the indebtedness for which the warrants were issued was shown by the testimony to have been contracted anterior to the time the constitutional limitation was reached, since it in no way appears from the record that any portion of the indebtedness evidenced by these warrants was incurred at a subsequent date."

The Supreme Court of Colorado, therefore, in the case of *Lake County vs. Standley*, 49 Pac. Rep., 23, decided, and on rehearing (p. 29) again decided, that although a warrant bears date after the limitation prescribed by the constitution becomes operative in a county, and although the amount of the warrants then outstanding may be in excess of the limit prescribed by the constitution, if it be applicable, yet the burden is upon the county to show that such warrants are invalid, and *that this burden is not met by showing that the warrants or any of them bear date after the county*

becomes subject to the constitutional limitation, although the amount of warrants outstanding exceeds the limit prescribed by the constitution, for *non constat* the indebtedness itself was incurred many months or even years prior to the issue of the warrants, and prior to the constitutional limitation being applicable or being reached.

The said suit of *Lake County vs. Standley*, 49 Pac. Rep., 23, was an action by Standley brought upon certain coupons from Lake County funding bonds, and the court, as we have above stated, held that it was not a defense to such bonds to show that the warrants which were refunded thereby were issued after the limitation prescribed by the constitution became applicable to Lake county and after the debt limitation had been reached, because it would not be presumed from those facts that the indebtedness represented by the warrants which were refunded was illegal, or that it had been incurred after the constitutional limitation became applicable to the county.

Furthermore these warrants were not offered in evidence to show, nor did they show, the indebtedness at the particular time when the bonds were issued. Those warrants were clearly not admissible as against the *bona fide* holder of the bonds in question containing the recital, "That this issue does not exceed the limit prescribed by the constitution of the State of Colorado." Those warrants are clearly not admissible in any event as constructive notice to the *bona fide* holder of the said bonds. There is no statute or statute requirement that those old warrants shall be kept on hand, and no requirement that they shall be constructive notice or any notice, or *prima facie* evidence or

any evidence, against the *bona fide* holder of the bonds of the county.

When these warrants were offered in evidence there was no proof or offer to prove any facts which would make these warrants material evidence.

The pencil memoranda made on the packages containing the warrants were clearly not admissible in evidence. These memoranda were not made by anybody in the course of duty, nor were they for any other reason made admissible evidence of anything as against the *bona fide* holder or as against anybody. There was no testimony or evidence accompanying them to prove any fact in issue.

It appears from the testimony which was given that these memoranda were probably made by various persons; it was not certainly known by whom; and that they were probably made when the warrants were funded; and that they were probably not made by county officers but by other persons. The trial court admitted them in evidence apparently on some theory that they formed part of the "records" of the county. With all due respect to the trial court, we feel constrained to say that to admit such evidence as this to impeach the solemn obligations of the county seems like dealing out hard justice (or rather injustice) to the bondholder. These warrants and these memoranda did not prove anything. They were offered in evidence for the purpose in and of themselves of proving the indebtedness of the county, and that such indebtedness was illegal as being in excess of the limit prescribed by the constitution; but they did not in and of themselves prove any such thing, and no testimony or evidence was offered in connection with them which rendered them in any wise admissible.

The views of the Circuit Court of Appeals on this point are well reasoned, and we submit are entirely sound (Record, p. 184, bottom, and 185).

VIII.

The trial court erred in admitting in evidence the orders and proceedings of the county court authorizing the issue of the bonds in question as against a bona fide holder of the bonds with the recitals therein contained. "That this bond is issued * * * under and by virtue of and in full conformity with the provisions of the act," &c.

On this point we need only cite the decision of this court in the case of *Evansville vs. Dennett*, 161 U. S., 434, referred to at length *(Ante, p. 65)*.

The trial Court in the face of the specific contrary recital in the bond held a purchaser to have constructive notice of the certificate, in the orders and proceedings of the County Commissioners authorizing the bonds, as to the amount of indebtedness that was being funded, as well as the semi-annual statements. But this certificate would give no information as to *when* the indebtedness was contracted or whether it was excessive.

See on this point *Lake County vs. Standley*, 49 Pac. Rep., 23, *supra*, p. 104.

An analysis of this funding act will clearly show that

the certificate to be made as to the outstanding warrants was *never intended as a record of the amount of bonds to be issued.* The first section provides for publishing, for the period of thirty days, a notice requesting the holders of warrants to state in writing, within thirty days from the first day of publication, what amount of warrants they will exchange for bonds. The Board then submits to the people the question of funding such warrants as the holders will exchange. In case the people vote in favor of funding, the Board can issue to any person it sees fit bonds in exchange for warrants. The whole amount of bonds shall not exceed the indebtedness at the time of the first publication, "and the amount shall be determined by the County Commissioners and a certificate made of the same and made a part of the records of the county, and any bond issued in excess of said sum shall be null and void."

The people don't vote on any proposition to issue a definite amount of bonds. The issuance of some bonds is not dependent on whether *all* the warrant holders will make the exchange. Neither is it limited to such warrant holders as have agreed in advance to make the exchange. The whole scheme contemplates that the Board shall be placed in a position to make the exchange from time to time, as warrant holders present warrants, and make an agreement with the Board for the exchange. Until this is done, there is no contract. Neither the warrant holder nor the Board is bound until the exchange is made. The bonds actually issued may be for but a small part of the warrant debt. The purpose of fixing the amount of the debt by this certificate is to to limit the amount of bonds that can be issued, but not to fix the amount that must be issued. No debt

was contracted until the bonds were signed and delivered. As these bonds were signed and delivered from time to time, there were separate and independent contracts made with the several warrant holders. The act provided that "each bond shall state upon its face the amount for which the same is issued, to whom issued, and the date of its issuance." The act does not contemplate an issue of an aggregate amount of bonds in bulk, at one time, and as one issue. Only a small part of these bonds were issued in 1882. They were being issued all through the year 1883. The act provides that if the vote is favorable, the Board "*may* issue *to any person* or corporation holding any county warrant or warrants issued prior to the date of the first publication of the aforementioned notice, coupon bonds of such county *in exchange therefor, at par.*" Every issue is a distinct transaction. The evidence in this case is that these bonds were executed only as warrants were presented, and the Board agreed to make the exchange, and this was in accordance with the true theory of the statute. Such of these bonds as were actually issued and delivered after the valuation of 1883 went into effect would be protected by that valuation, and there was no attempt to show what this was.

This certificate, then, was intended to show what amount of valid indebtedness was outstanding. As we have seen, the amount shown by the certificate could exist, as valid indebtedness, if a sufficient amount of it was contracted before the county had an assessed valuation of $1,000,000. On this fact the certificate would throw no light. Neither would it establish the amount of bonds to be issued. Seeing that neither this record nor the record of the semi-annual statement, even if both had to be taken notice of by a purchaser,

would furnish no adequate information as to the validity of these funding bonds, the defendant offered and the Court admitted in evidence the warrants that were funded, with a view of showing that a sufficient amount of them was issued after the county had an assessed valuation of $1,000,000, to make an excessive indebtedness. In other words, the Court absolutely ignored and rejected the recitals of the bonds and treated the case as one in which the excessive indebtedness could be shown by any kind of evidence tending to establish the fact. This was not done on the theory that the plaintiff was not a *bona fide* purchaser, for the Court, after doubting this, finally decided the case upon the *concession* that it was such purchaser. Unless the entire line of adjudication of the Supreme Court since the decision of this Court forty years ago in *Knox Co. vs. Aspinwall*, 21 How., 539, 1858, in regard to estoppel by recitals in bonds is to be overthrown, all of this evidence was improperly admitted.

IX.

Burden of Proof in Actions on Negotiable Municipal Bonds.

The rule of law is well settled that when a plaintiff brings an action on a negotiable municipal bond or coupon he need only allege and prove the making of the instrument by the defendant. If the defendant claims that there is any illegality or fraud in connection with the instrument, the burden is on the defend-

ant to allege and prove such illegality or fraud. If such illegality or fraud be proved, then the burden is on the plaintiff to show that he paid value for the instrument. If the plaintiff proves the payment of value then the burden is on the defendant to show that the plaintiff had notice of the illegality or fraud.

Lexington vs. Butler, 14 Wall., 282.
Macon County vs. Shores, 97 U. S., 272.
Cromwell vs. Sac County, 96 U. S., 51.
Montclair vs. Ramsdell, 107 U. S., 147.

The plaintiff need not, however, wait for the proof to take this course, but he may in the first instance allege and prove that he paid value. Thereafter any evidence of illegality or fraud is inadmissible unless it is accompanied by proof or offer of proof of notice to the plaintiff of such illegality or fraud; and it is error for the court to admit any evidence establishing or tending to establish such illegality unless such evidence is accompanied by proof or offer of proof of notice to the plaintiff of such illegality.

This proposition has been expressly decided by this Court in the case of *County of Macon vs. Shores*, 97 U. S., 272. The complaint in that case alleged that the plaintiff was the holder of the coupons for value. The answer of the county set up fraud. The plaintiff filed a replication denying all the allegations of the answer. The plaintiff offered evidence to prove that he was a *bona fide* holder of the coupons for value and without notice. The county offered evidence to prove the alleged fraud and irregularities. The plaintiff objected. The objection was sustained and exception noted by the defendant. The Court, at the close of the testimony, instructed the jury that the evidence was insufficient to support the defense and the county excepted.

On writ of error, this Court considered the exceptions to the evidence and said (p. 277):

"The plaintiff had a right to prove that he was a *bona fide* holder of the coupons. The petition averred the fact. It was denied by the answer. It is true the presumption of law *prima facie* was that the plaintiff was such holder; but, if he chose to meet the issue by direct affirmative proof, it was clearly competent for him to do so. The testimony tending to show fraud and irregularities touching the issuing of the bonds and in disposing of them was properly rejected. The plaintiff being a *bona fide* holder of the coupons, it was incompetent to affect his rights."

The plaintiff in the present case proved that it is the owner of the coupons in question, and that it paid value therefor; and also proved that it acquired the same from a previous holder who had paid value therefor (Record, pp. 36–38). After this evidence the defendant undertook to introduce certain evidence which it claimed showed illegality in the issuance of the said bonds, but did not accompany such evidence with any proof of notice to plaintiff of such illegality, or any offer to prove such notice. The evidence which the defendant relied on to prove such illegality consisted of the so-called financial statements, and the warrants and list of warrants and the orders of the county court authorizing the issue of the bonds, and the defendant claimed that these were things of which the plaintiff had *constructive* notice; in other words, the defendant attempted to prove the illegality and the notice by the same facts, so that the question was presented to the trial court and the question was on the exceptions presented to the Circuit Court of Appeals whether these facts proved such illegality *and such constructive notice.* Standley had already testified that he had no *actual* notice of any facts which would render the

said bonds illegal (Record, p. 36), and no such notice was proved or offered to be proved. Hence under the decisions unless the so-called financial statements and the warrants and the orders of the county court authorizing the issue of the bonds are in and of themselves constructive notice to any and every *bona fide* holder of the bonds and sufficient to overcome the contrary, specific and positive recitals in the bonds, they were inadmissible as evidence.

No such course was taken here as was taken in the case of *First Unitarian Society vs. Faulkner*, 91 U. S., 415. 417, where evidence was admitted, "subject to the condition that the plaintiffs should subsequently prove" certain other facts which made the testimony competent. In the present case the offering in evidence of these financial statements and these warrants, &c., was not accompanied by any offer to prove or attempt to prove that the plaintiff had any actual notice of the same; on the contrary, it clearly appears from the bill of exceptions that these were offered in evidence with the idea that they were themselves constructive notice, and the charge of the court also states this fact, and shows conclusively the theory upon which they were offered and received in evidence.

Note that there was no offer to prove notice by any other testimony, but an attempt to prove constructive notice by the evidence, which was offered, and the Circuit Court held that this could be done even as *against the recitals* in the bonds, and as against the *bona fide* holder of such bonds.

The learned counsel for the county have attempted to make the point that the Circuit Court of Appeals had no right to say that the plaintiff was a *bona fide* holder of the coupons in question, but the Circuit Court

of Appeals was clearly correct in its position for the reasons stated in this brief, *supra*, p. 32.

So, also, the language of this court in the case of *Scotland County vs. Hill*, 112 U. S., 183, is specially pertinent. The court there says (p. 186):

"It is evident from the whole record that the court below proceeded on the theory that the decree in the Wagner suit could not conclude the plaintiff, and that consequently it was a matter of no importance whether he had notice of the pendency of the suit or not. In our opinion, the error began with the exclusion of the record in that suit. As notice of the pendency of the suit was, however, necessary to bind the plaintiff by the decree, proof of that fact was offered so that the question as to the effect of the decree upon this suit might be properly presented for review if deemed advisable."

So we say in the present case that the financial statements, the warrants and list of warrants and memoranda concerning the same, and the orders and proceedings of the county commissioners with regard to this issue of bonds, were all of them inadmissible as against the plaintiff, unless such proof were accompanied by proof or an offer to prove actual notice by the plaintiff of the alleged illegality in the bonds, and of the facts which were contained in the said evidence which was offered.

The defendant pleads, by way of defense, the alleged invalidity of the bonds from which the coupons sued on were taken, and also the alleged invalidity of the warrants in lieu of which they were issued. The presumption is in favor of the validity of all of these obligations, and the burden of proof is on defendant to show to the contrary; and to show that plaintiff had notice of such illegality.

If, on any state of facts, these bonds could lawfully have been issued, the court is bound, in favor of a bona fide holder, to presume the existence of such state of facts.

Inasmuch as these bonds recite that they are issued to refund "valid floating indebtedness," it must be presumed that such indebtedness was valid, if this can be done consistently with the constitution, the assessed valuation and what appears on the face of the bonds. The warrant indebtedness and the refunding bonds would all be valid if the same had been incurred before the completion of the assessment for the year 1881 (See *Lake County vs. Standley*, 49 Pac. Rep., 23, *supra*, p. 104). There was no evidence to show that, as a matter of fact, any of the indebtedness was incurred after that date; but, even if it had been incurred after that date, the fact that it *might* have been incurred before, and that the bond recited that it was issued to refund "valid floating indebtedness," is conclusive in favor of the *bona fide* holder. This rule, that, if on any state of facts the *bona fide* holder is entitled to recover, such facts must be presumed, is well settled by the decisions of this court.

In *City of Lexington vs. Butler*, 14 Wall., 282, this court, Mr. Justice CLIFFORD delivering the opinion, said (p. 296):

"Admitted, as it is, that the corporation defendants possessed the power to subscribe for the stock and to issue the bonds, it is clear that the plaintiff is entitled to recover upon the merits, as the repeated decisions of this court have established the rule that, when a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the

circumstances which give the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper."

In *San Antonio vs. Mehaffy*, 96 U. S., 312, this court, Mr. Justice SWAYNE delivering the opinion, said (p. 314):

"The holder of commercial paper, in the absence of proof to the contrary, is presumed to have taken it underdue for a valuable consideration, and without notice of any objection to which it was liable (2 Pars. Bills and Notes, 9; *Pinkerton vs. Bailey*, 8 Wend. [N. Y.], 600).

"There is certainly nothing in the record which shows that such is not the position of the defendant in error.

"This shuts the door, as matter of law, to all inquiry touching the regularity of the proceedings of the officers charged with the duty of subscribing and making payment in the way prescribed. The rule in such cases is that if the municipality could have had the power under any circumstances to issue the securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the authority, and they are no more liable to be impeached in his hands for any infirmity than any other commercial paper *(Supervisors vs. Schenck*, 5 Wall., 772; *San Antonio vs. Lane*, 32 Tex., 405)."

In *San Juan County vs. Oliver*, 7 Colo. App., 515, the Court said:

"The warrants directed the Treasurer of the county to pay to W. F. Graf or bearer the sums specified, 'for salary as County Treasurer,' out of money in the treasury not otherwise appropriated. If they are valid upon their face the presumption is that they were lawfully issued. This presumption could be overthrown only by positive evidence of their illegality, and the burden was upon the defendant to show the facts which invalidated them. They were received in evidence without objection, except that which goes to their form and contents."

In *State vs. Hannibal*, etc., 21 S. W. Rep., 14, the Supreme Court of Missouri said:

"We think, however, that Courts can presume that an act was done prior to a period after which it could not lawfully have been done. The Constitution which was adopted in 1875 took from the Legislature the power to authorize any township in the State to lend its aid to any corporation whatsoever, or to become a stockholder therein. Since the adoption of the Constitution these townships, or the counties in their behalf, have no authority to lend their credit to railroad companies, or to issue their bonds in furtherance of a purpose to do so. We must presume, then, that the bonded indebtedness of this township was created prior to the enactment of said Section 6799, and, therefore, the statute and the conditions and limitations therein provided for making levies to raise taxes to pay principal and interest on township aid bonds has no application to the bonds in question."

In *County of Clay vs. Society for Savings*, 104 U. S. 579, 586, the Court said:

"The second answer is, that if the county had under the law authority to issue bonds, and did issue them, and they went into circulation and came to the hands of a *bona fide* holder, he was not, in a suit upon them, required to aver or prove the performance of any of the requisites necessary to give them validity. The want of such performance is a matter of defense and the burden of proof is upon the county to establish it (*Lincoln vs. Iron Company*, 103 U. S., 412). In this case the county offered no evidence in any degree tending to show that the condition precedent upon the performance of which the issue was authorized had not been complied with. It cannot, therefore, assume that the conditions were not performed and insist on non-performance as a defense."

In *Lincoln vs. Iron Company*, 103 U. S., 412, 416, the Court said:

"Now, if the township could only make the donation alleged by way of an election duly held, it was the duty of the Court below to require proof of this fact as well

as of the other facts necessarily involved in the issue as made, and it will be presumed that this was done. What proof was sufficient for this purpose it is not necessary to decide, as no exception was taken on that point. But we do not think that there was any defect in the declaration to be cured. We think that it would have been good on demurrer. The township had authority by law to issue its bonds by way of donation to a railroad. It did issue its bonds. They got into circulation as commercial securities and were purchased by the plaintiff. All the plaintiff had to do in case of non-payment was simply to sue on the bonds. If there was any defense to them by reason of want of performance of any of the requisites necessary to give them validity, or for any other cause, it was for the defendant to show it. A bond, especially a negotiable bond, is a *prima facie* obligation of the obligor if he has capacity to make it, and is binding according to the terms and conditions apparent on its face until the contrary be shown. Whether an alleged defense, when set up, is or is not good against the particular holder, is to be determined by the Court in each case."

How has this defense been sustained? To determine this, it is well to first inquire as to the amount of indebtedness this county could lawfully have. It could have (1) all debts contracted before the adoption of the Constitution; (2) all debts contracted before the county had an assessed valuation of $1,000,000; (3) an additional debt, over these two items, at the rates specified in the Constitution Article XI., § 6.

No defense, then, is made out by this semi-annual statement, and hence the defendant was driven to rely on the record made by the Board as a preliminary to the issuance of the bonds. We have elsewhere shown that this was not a record intended or adapted to show the amount of bonds that would be issued. So that, even if a purchaser had seen these two records, he could not form any correct opinion as to the validity of any one of these bonds. He would see plainly that

bonds 9 to 13 were within the limit. He would see, also, that bonds 63 to 66 were within the limit of debt that could be contracted without a vote of the people, and he could see that, with such a vote, a debt could be contracted which would include 96 or 98. A purchaser cannot, in any view, be held to constructive notice of anything beyond what the record shows; and we submit, as a fair test of this notice, that this Court cannot adjudicate, from the face of these records, that any of these bonds are invalid. The only way in which the Court below could figure this out was to construe the record made by the Board as furnishing evidence to a purchaser that $175,000 of bonds were being issued, and then condemn them *all* because *some* of them were beyond the limit.

There was no proof as to when these bonds were actually issued and delivered. While they were all issued as of December 1, 1882, they were not all actually issued until, at different times, in 1883, and, possibly, some of them in 1884. There is no evidence as to what the assessed valuation of this county was in 1883 or 1884. It may have increased, and it will be presumed under the specific and positive recitals in the bonds, to have increased, to such an amount as to warrant the issuance of all these bonds. The debt on the bonds was not incurred until the bonds were issued, exchanged and delivered *Aspinwall vs. Daviess Co.*, 22 How., 364 ; *Francis vs. Howard Co.*, 50 Fed. Rep., 44 ; *Land, etc., vs. Davis Co.*, 6 Kan., 256 ; *Cumberland, etc., vs. Barren Co.*, 10 Bush., 604 ; *List vs. Wheeling*, 7 W. Va., 501.

In *Aspinwall vs. County of Daviess*, 22 How., 364, between the time of the vote of the people and the issuance of the bonds, the Constitution was changed so

as to prohibit their issuance. The Court held that the bonds were invalid on the ground that it was the *issuance* of the bonds, and not the vote of the people, that created the contract. A similar ruling was made in *Francis vs. Howard Co.*, 56 Fed. Rep., 44, and in *Land Grant Railway and Trust Co.*, 6 Kan., 256. The vote created no contract.

X.

In any view the bond issue is excessive only in part, and the burden is upon the defendant to prove that any particular bonds are invalid.

This precise proposition has been decided by the Supreme Court of Colorado in *Lake County vs. Standley*, 49 Pac. Rep., 23.

The first bonds received by Standley were numbered from 9 to 13, inclusive. These were clearly within the constitutional limitation and there was no attempt to show that the warrants exchanged for them were not valid. The Court below held that, if any of these funding bonds were excessive, they were *all void*. Upon this ruling the tenth assignment of error is predicated. This is not the law. We may, for the sake of the argument, concede that where an issue of bonds is made upon one contract, and by such issue the limitation is violated, the entire issue will be invalid. The reasons of this rule are stated in *Hedges vs. Dixon County*, 150 U. S., 182, and kindred cases. These adjudications proceed upon the principle that for a Court to enforce

payment of any of the bonds would be to make a new and different contract from that made by the issuance thereof.

This principle can have no application to these funding bonds. As we have seen, the funding act contemplates that these bonds are issued direct to the holders of warrants and in exchange therefor. They were not one entire issue. While they were all, for convenience, dated as of one date, they were signed and delivered, from time to time, as warrants came in for exchange. They were numbered as issued. The statute required this. There was no effort on the part of defendant, either in its pleadings or proof, to make any distinction between these bonds or the floating indebtedness which was funded by them. It proceeded upon the theory that the amount of warrants outstanding at the time the funding proceedings were commenced was excessive and that the bonds, no matter how long afterwards they were issued, were, therefore, excessive, and, consequently, that all the warrants and all the bonds were *void*. A more monstrous proposition was never announced in a Court of justice.

In the *Citizens' Bank vs. City of Terrell*, 78 Texas, 450, 460, the Court said:

"If the bonds were delivered at different dates, those first delivered, up to the amount of the debt that the City could lawfully create, should be paid, and the remainder of them should be treated as nullities *(Daviess County vs. Dickinson*, 117 U. S., 657*)*."

In *Catron vs. Lafayette County*, 106 Mo., 659, 668, the Court said:

"The five bonds sued on were sold, assigned and delivered to plaintiff for their face value in money by Hackett, on the 14th of January, 1867, so that at that

time the aggregate of the bonds ordered and issued by the County Court, including these sued on, amounted only to the sum of $5,500. It was doubtless the duty of the plaintiff when he purchased these bonds to ascertain whether they were within the limit of the power of the County Court, under the law, to issue them. But if, at the time they were issued and purchased, it was within the power of the Court to issue them, no subsequent improper issue of bonds could impair his rights under the bonds thus legally issued and purchased by him. The fact that the County Court, after he had paid his money for these bonds, and his rights under them had become fixed, issued other bonds for the same purpose, until finally they exceeded in the last issue, by a small sum, the aggregate amount which they were authorized to issue for such purpose, could in no way affect the integrity of these bonds of plaintiff, issued strictly within the limits of their power. The issue for the excess only would be void. The bonds issued and delivered before the limit of the power was reached are valid, and plaintiff's were of this number *(Daviess County vs. Dickinson*, 117 U. S., 657; *Stockdale vs. School District*, 47 Mich., 226; *McPherson vs. Foster*, 43 Iowa, 48*)*."

In *Culbertson vs. City of Fulton*, 127 Ill., 30, 38, the Court said:

"The indebtedness, however, can only be regarded as void to the extent of the amount of the excess over the constitutional limit. Up to and under that limit the indebtedness is valid. The inhibition operates upon the indebtedness and not upon the form of the debt. In the State of Iowa, which has a constitutional provision almost identical with that now under consideration, the officers of the school district made a contract to build a school house, for which the contractors were to receive $15,000 in bonds of the district, when the amount of the indebtedness which the district could lawfully contract was only $2,057.50. The Supreme Court of that State say: 'We have seen that for the excess over the prescribed limit no right of action exists against the district. The question now arises, is the district liable for the amount of indebtedness within the restricted limit? We think it is. As we have seen, the constitutional inhibition operates upon the indebtedness, not upon the form of

the debt. The district may become indebted to the amount of $2,057.50 by bonds. If the debt exceeds that amount, it is void as to the excess because of the inhibition upon the power of the district to exceed the limit, and the bonds as to the same excess are void because of the non-existence of a valid debt therefor. But this restriction does not extend to the sum of $2,057.50, for which the district had power to issue its bonds. That sum is a valid debt. The bonds to that extent are valid' (*McPherson vs. Foster Bros.*, 43 Iowa., 48; see, also, *Stockdale vs. Wayland School District*, 47 Mich., 226; *Mix vs. People*, 72 Ill., 241).'

In *Stockdale vs. Wayland School District*, 47 Mich., 226, the Court said (p. 664):

"There seems, however, to have been a statutory limit to the amount of bonds which the district might issue, and tl is was overlooked at the first meeting. The limit for districts having more than 100 and less than 200 children within the school ages—as this district had—is $3,000 (Public Acts 1877, page 169). The district was already bonded to the amount of $2,700, and if the vote had been limited to $300, it would have been valid. Having exceeded that sum, it is claimed to be void. In *McPherson vs. Foster*, 43 Iowa, 48, involving substantially the same question, tl e vote was held valid to the extent that would have been admissible had the limited sum been proposed and voted; and we agree in this view. See, also, Grand Gulf Bank vs. Archer, 8 Smedes & M., 151. The injunction should, therefore, have been restricted to the excess above $300."

In *Daviess County vs. Dickinson*, 117 U. S., 657, the Court said (p. 664):

"Then comes the question which of the bonds are valid and which invalid. We can have no doubt that the test is, which were first delivered, if that can be ascertained, and without regard to the classification of bonds according to times of payment in the order of the County Court; for, as the County Court was authorized to determine at what time the bonds should be payable, any one, taking a bond signed by the presiding Judge and the Clerk and bearing the seal of

the county, had the right to presume that it was valid, provided the County Court had not already issued bonds to the amount limited by the statute and by the vote."

In the case at bar, the *statute* did not limit the amount of bonds to be issued, neither did the vote do so. The vote simply authorized, but did not require, the Board to exchange bonds for warrants. The amount to be exchanged would necessarily be limited to the amount outstanding, but *need not reach that amount.* This would depend upon the warrant holders. Until they presented warrants and agreed to take bonds, there could be no bonds issued. And whenever a warrant holder presented his warrants and agreed to exchange them for bonds, then bonds were issued to make the exchange; and then, and then only, a distinct and separate contract was made by each transaction. Suppose that Mr. Standley's warrants were issued before the constitutional limitation became applicable to this county, and were, therefore, perfectly valid (and there is no evidence to the contrary), and the bonds he took for them were, also, on their face, and, as a matter of fact, within the limitation, can he be deprived of his property merely because the Board went on afterwards and exchanged other bonds beyond the limit for void warrants? Suppose this county had outstanding $100,000 of valid warrants and $75,000 of void warrants, and the holders of the valid warrants present them and get the first bonds up to $100,000, and the holders of the void warrants thereafter exchange *them* for bonds, can the county repudiate the entire issue, or, rather, the *first and valid issue?* We think not. The Court, however, held that notwithstanding Standley's warrants

were perfectly valid (for there was no attempt to show that they were not), and notwithstanding the bonds he received for the warrants were within the limitation, such bonds were invalid if the Board afterwards issued to other people, in exchange for other warrants, bonds which aggregated an amount exceeding the constitutional limitation. This cannot be the law.

By going back to the warrants and certain memoranda, the defendant attempted to prove that at the time these bonds exchanged with Standley were issued, there were others issued, amounting, in the aggregate, to $49,900. These bonds were issued to N. P. Seeley (Record, pp. 54, 55). In other words, Seeley had the warrants of Standley and other people in his possession for exchange, and, instead of having the bonds issued to the real parties who owned the warrants, he had them issued to himself or bearer, and then delivered them according to the ownership of the warrants; and, as there were, in one transaction, $49,900 of these bonds thus issued and delivered, it is sought to make this an issue to that amount, and thus vitiate bonds numbered from 9 to 13 inclusive. This effort proceeds upon the theory that this amount is itself beyond the limit, *but this is not true.* The pretended semi-annual statement put in evidence by the county shows an issue of $57,000 of warrants not affected by the constitutional limitation. Standley, even if he had known that all these bonds were issued at the same time his were, could not know, from any record in existence, but that they were all issued for valid indebtedness. By the list of warrants, Exhibit K (Record, p. 135), it appears that enough of these warrants were issued in 1881, before the valuation reached $1,000,000, and in 1882, before the limitation was reached, to more than

cover the first thirteen bonds which were issued, and, in the absence of any identification of Standley's warrants, the presumption would be that they were the valid ones. It is also a reasonable inference that the earlier bonds were issued for the earlier warrants.

XI.

Charge of the Court considered and shown to be fundamentally unsound.

We submit with due respect that an examination of this charge will show that not one correct legal principle was stated in it from beginning to end.

The first paragraph of the charge (which is made the ground of the seventh assignment of error) holds that there can be no estoppel, by any recital in the bond, against a defense based upon the constitutional provision limiting the indebtedness of a county. This was in direct conflict with the decision of this court in the case of *Chaffee County vs. Potter*, 142 U. S., 355.

The next paragraph of the charge (which was made the basis of the eighth assignment of error) practically declared that these bonds (issued to a certain payee or *bearer)* were not commercial paper, and that a purchaser must take notice of both the record made under the funding act and that made under the act of 1877, and assumed, without expressing it, that these records were valid notice, and sufficient to show the invalidity of the bonds. All of these rulings and assumptions have been elsewhere challenged in this brief and shown to be erroneous.

The next paragraph (which is the ground of the

ninth assignment of error) declared that the indebtedness incurred before the county had a valuation of $1,000,000 must be taken into consideration in determining whether a county, when its valuation reached $1,000,000, could incur *any* indebtedness. In other words, that its indebtedness could not exceed the constitutional limitation, *inclusive* of that contracted before such limitation became applicable to the county. This proposition is directly contrary to the constitution, which says, "*exclusive* of debts contracted before the adoption of this constitution." If this were law, this defendant and many of the counties in this state, at the time of reaching a valuation of $1,000,000, would have been utterly incapable of making a contract or issuing a valid warrant for any purpose. A reading of the plain and unambiguous provision of the Constitution in question will show that the counties of this State, when their assessed valuation for the first time reached $1,000,000, then and then only became subject to it, and could go on and incur indebtedness thereunder, within the limit, wholly irrespective of any debt contracted before the limitation became operative. The Court concludes this paragraph by holding that the semi-annual statements show that the increase of indebtedness in the years 1881 and 1882 was greatly in excess of the constitutional limit. This declaration was made (and could only have been made) chiefly on the statement of December 31, 1882, long *after* the bonds numbered from 9 to 13 had been issued and delivered. It will be remembered, also, that all of these bonds were issued as of December 1 1882. Mr. Standley bought the other five bonds in June, 1883, but they were dated as of December 1, 1882. Would *he* think of looking for a semi-annual statement made *after* the

date of his bonds? Will any Court hold that a purchaser, for cash, of these last five bonds, must take constructive notice of a record made a month *after* the bonds, on their face, purport to have been issued? We shall see. The statement of June 30, 1882, does not show an over-issue upon any correct view of the law. When we take into consideration the amount of debt that could be created, the amount of money in the treasury, and the amount of collectible delinquent taxes that may have been outstanding, every dollar of debt shown by this statement may have been valid, and the recital in the bonds be in accordance with the fact. The Court had to go into the realm of speculation and pure guesswork to say that any part of this debt was invalid. It must be borne in mind, further, that a warrant is but the evidence of a debt, and the debt itself, upon which many of these warrants were issued in 1882, may have been, and doubtless was, actually contracted in 1881, before the assessed valuation reached $1,000,000. There was no evidence to the contrary. Indeed, the defendant was not required to actually *prove* anything. This case and other cases were practically tried below on the theory that every presumption, reasonable or unreasonable, is to be indulged against a man who would put his cash into bonds of this kind. This is not the song the counties sing when they are trying to sell and exchange their bonds.

In the next paragraph (which is made the basis of the tenth assignment of error) the Court declared that "the rule established in the Courts is that if of a series of obligations issued there may be any of them void, the Court cannot distinguish between them." We have seen in another connection that this is not the law in regard to renewal bonds issued from time to

time to different people as warrants are presented for exchange. Courts will find some way to get nearer truth and justice in such a case than they would be in declaring *all such bonds* invalid. It would not be unreasonable to make the conclusive presumption in favor of a *bona fide* purchaser that the first bonds issued up to the limit of the Constitution represent the valid indebtedness and are, therefore, valid. If this presumption should not obtain, the burden should be on the defendant to show, as against any particular bond, that the warrants funded by it were invalid. If the defendant, in exchanging bonds for warrants, transacted the business in such a way as not to be able to know what particular warrants are represented by any particular bond, it is not *our fault*. The negligence of the defendant resulting in this confusion should not be rewarded by allowing it to repudiate *all of its valid* indebtedness merely because some bonds were issued for some invalid warrants. In the absence of evidence, the fair presumption is that the first issues of bonds were exchanged for the valid warrants. In legal theory, every bond was a separate and distinct issue. The funding act required the bonds to be numbered in the order in which they were issued and the name of the payee inserted therein, and hence every bond created a *separate and independent* contract. The contention spoken of in this paragraph was no contention of ours. We have always maintained, as we do now, that all warrants issued before the county had an assessed valuation of $1,000,000 were valid, and that when the county reached this valuation it could go on and incur a further indebtedness to the full limit of the Constitution. The other paragraphs of this charge we have considered under separate headings.

XII.

Validation by Constitutional Amendment.

In *Dudley vs. Lake County*, No. 177, now pending in this Court, are presented some views in regard to the force and effect of a constitutional amendment adopted in 1888. As this case is to be argued upon the same day as that, we do not deem it necessary to repeat or attempt to amplify what is there said on this subject.

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APPENDIX.

I.

Statute of Colorado approved February 21, 1881, under which the bonds in question were issued.

[*Session Laws Colorado, 1881, p. 85.*]

"An act to enable the several counties of the State to fund their floating indebtedness.

"SECTION 1. It shall be the duty of the County Commissioners of any county having a floating indebtedness exceeding $10,000, upon the petition of fifty of the electors of said county, who shall have paid taxes upon property assessed to them in said county in the preceding year, to publish, for the period of thirty days—in a newspaper published within said county—a notice requesting the holders of the warrants of such county to submit in writing to the Board of County Commissioners, within thirty days from date of the first publication of such notice, a statement of the amount of the warrants of such county, which they will exchange at par and accrued interest for the bonds of such county, to be issued under the provisions of this act, taking such bonds at par. It shall be the duty of such Board of County Commissioners, at the next general election occurring after the expiration of thirty days from the date of the first publication of the notice afore mentioned—upon the petition of fifty of the electors of such county who shall have paid taxes upon property assessed to them in said county in the preceding year, to submit to the vote of the qualified electors of such county, who shall have paid taxes on property assessed to them in said county in the preceding year—the question whether the Board of County Commissioners shall issue bonds of such county, under the provisions of this act, in exchange, at par, for the warrants of such county, issued prior to the date of the first publication of the aforesaid notice,

or they may submit such question at a special election, which they are hereby empowered to call for that purpose, at any time after the expiration of thirty days from the date of the first publication of the notice aforementioned, on the petition of fifty qualified electors as aforesaid, and they shall publish, for the period of at least thirty days immediately preceding such general or special election, in some newspaper published within such county, a notice that such question will be submitted to the duly qualified electors, as aforesaid, at such election. The County Treasurer of such county shall make out and cause to be delivered to the judges of election in each election precinct in the county, prior to the said election, a certified list of the taxpayers in such county who shall have paid taxes upon property assessed to them in such county in the preceding year, and no person shall vote upon the question of the funding of the county indebtedness unless his name shall appear upon such list, nor unless he shall have paid all county taxes assessed against him in such county in the preceding year. If a majority of the votes lawfully cast upon the question of such funding of the floating county indebtedness shall be for the funding of such indebtedness, the Board of County Commissioners may issue to any person or corporation holding any county warrant or warrants, issued prior to the date of the first publication of the aforementioned notice, coupon bonds of such county in exchange therefor, at par. No bonds shall be issued of less denomination than $100, and, if issued for a greater amount, then for some multiple of that sum, and the rate of interest shall not exceed eight per cent. per annum, the interest to be paid semi-annually, at the office of the County Treasurer, or in the city of New York, at the option of the holders thereof, such bonds to payable at the pleasure of the county, after ten years from the date of their istuance, but absolutely due and payable twenty years after date of issue. The whole amount of bonds issued under this act shall not exceed the sum of the county indebtedness at the date of the first publication of the aforementioned notice, and the amount shall be determined by the County Commissioners, and a certificate made of the same, and made a part of the records of the county; and any bond issued in excess of said sum shall be null and void, and all bonds issued under the provisions of this act shall be registered in

the office of the State Auditor, to whom a fee of ten cents shall be paid for recording each bond.

"SEC. 2. All bonds which may be issued under the provisions of this act shall be signed by the Chairman of the Board of County Commissioners, countersigned by the County Treasurer of the county, and attested by the Clerk of said county, and bear the seal of the county upon each bond, and shall be numbered and registered in a book kept for that purpose by the County Treasurer, in the order in which they are issued. Each bond shall state upon its face the amount for which the same issued, to whom issued, and the date of its issuance.

"SEC. 3. The County Commissioners shall be authorized to prescribe the form of such bonds, and the coupons thereto, and to provide for the half-yearly interest accruing on such bonds actually issued and delivered. They shall levy annually sufficient tax to fully discharge such interest, and for the ultimate redemption of such bonds they shall levy annually, after nine years from the date of such issuance, such tax upon all the taxable property in their county as shall create a yearly fund equal to ten (10) per cent. of the whole amount of such bonds issued, which fund shall be called the redemption fund. And all taxes for interest on and for the redemption of such bonds shall be paid in cash only, and shall be kept by the County Treasurer as a special fund, to be used in payment of interest on and for the redemption of such bonds only, and such taxes shall be levied and collected as other taxes.

"SEC. 4. It shall be the duty of the County Treasurer, when there are sufficient funds in his hands to the credit of the redemption fund, to pay in full the principal and interest of any such bonds, immediately to call in and pay as many of such bonds and accrued interest thereon as the funds on hand will liquidate as hereinbefore provided. Such bond or bonds shall be paid in the order of their number, and when any bonds or coupons issued under this act are taken up, it shall be the duty of such Treasurer to certify his action to the Board of County Commissioners, who shall cancel the same, so that they can be plainly identified, and cause a record to be made of the same. And when it is desired to redeem any of such bonds, the County Treasurer shall cause to be published for thirty days, in some newspaper at or nearest the county

seat of the county, and in a newspaper published in the city of Denver, a notice that certain county bonds by numbers and amounts will be paid upon presentation, and at the expiration of thirty days such bonds shall cease to bear interest.

"SEC. 5. All persons voting on the question as hereinbefore provided shall vote by separate ballot, which shall be deposited in a box to be used for that purpose only, and on which ballot shall be printed the words, 'For funding county debt,' or 'Against funding county debt.' And if, upon canvassing the vote (which shall be canvassed in the same manner as the vote for county officers), it shall appear that a majority of all the votes cast upon the question so submitted are for funding the county debt, then the County Commissioners shall be authorized to carry out the provisions of this act, and the Canvassing Board shall certify the vote, and it shall be made a part of the county records. The judges of election shall make and certify to the Clerk of the county a separate list of the names of the electors voting upon the question of the funding of the county indebtedness in the order in which the ballot of the elector so voting is received, and each ballot shall be numbered in the order in which it is received, and the number recorded on the said list of voters opposite the name of the voter who presents the ballot.

"SEC. 6. As soon as possible after such election, if the bonds shall be voted, the officers herein mentioned and authorized shall proceed to execute the provisions of this act.

"SEC. 7. All acts or parts of acts in conflict herewith are hereby repealed.

"SEC. 8. That inasmuch as several counties now have a large floating indebtedness and would be very much benefited by the immediate passage of this act, it is the opinion of this General Assembly that an emergency exists; therefore, this act shall be in force and take effect from and after its passage.

"Approved February 21, 1881."

II.

Extract from the Statute of Colorado Approved March 24, 1877.

[*Session Laws, Colorado, 1877, pp. 218, 227.*]

An act entitled "An act concerning counties, county officers and county government and repealing laws on these subjects," approved March 24, 1877, contained the following provision:

"SEC. 30. It shall be the duty of the Board of County Commissioners of each county to make out semi-annual statements at the regular sessions in January and July, at which times they shall have such statement published in some weekly newspaper published in the county, if there be such published; and, if there be no newspaper published in the county, such Commissioners shall cause such statements to be posted in three conspicuous places in said county, one of which shall be the Court House door; and such statement shall show the amount of debt owing by their county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall be shown from what officer and on what account any money has been received, and the amounts, and to what individuals and on what account any money has been paid, and the amounts; and shall strike the balance, showing the amount deficit, if any, and the balance in the treasury, if any, and the *statement thus made, in addition to being published as before specified, shall also be entered of record* by the Clerk of the Board of County Commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times."

NOTE.—The above section 30 is carried into the General Laws Compliation of 1887 and numbered therein as Section 457 of such Compliation.

We have given an analysis of these pro-

visions of the said act of March 24, 1877, at page 79 of this brief, to which we call the special attention of this court.

III.

County debt limit provisions of Constitution of Colorado.

Section 6 of Article XI. of the Colorado State Constitution, as it stood prior to the amendment of 1888, was as follows (General Statutes, Colorado, 1883, p. 62):

"No county shall contract any debt by loan, in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit: Counties in which the assessed valuation of taxable property shall exceed $5,000,000, $1.50 on each thousand thereof; counties in which such valuation shall be less than $5,000,000, $3 on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, *exclusive of debts contracted before the adoption of this Constitution*, shall not at any time exceed twice the amount above herein limited, unless when, in manner previded by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned: *Provided, That this sec-*

tion shall not apply to counties having a valuation of less than $1,000,000."

Section 6 of Article XI. of the Colorado State Constitution, as amended in A. D. 1888 (Mills' Annotated Statutes, Colorado, 1891, p. 326), is as follows:

"No county shall contract any debt by loan, in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit: Counties in which the assessed valuation of taxable property shall exceed $5,000,000, $1.50 on each $1,000 thereof; counties in which such valuation shall be less than $5,000,000, $3 on each $1,000 thereof; and the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt, but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned.

"*Provided, that any county in this State which has an indebtedness outstanding, either in the form of warrants issued for purposes provided by law, prior to December 31, A. D. 1886, or in the form of funding bonds issued prior to such date for such warrants previously outstanding, or in the form of public building, road or bridge bonds outstanding at such date, may contract a debt by loan by the issuance of bonds for the purpose of liquidating such indebtedness; Provided, The question of issuing said bonds shall, at a general or special election called for that purpose, be submitted to the vote of such of the duly qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed in such county, and the majority of those*

voting thereon shall vote in favor of issuing the bonds. Such election shall be held in the manner prescribed by the laws of this State for the issuance of road, bridge and public building bonds, and the bonds authorized at such election shall be issued and provisions made for their redemption in the same manner as provided in said law."

The change made in 1888 consisted in leaving out the old provisos and adding the new ones, the said old and new provisos being quoted above in italic.